In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-997

ARVO W. KANNISTO and the San Francisco Police Officers Association,

Petitioner,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, et al.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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The petitioner, Arvo W. Kannisto, and the San Francisco Police Officers Association, respectfully pray that a Writ of Certiorari issue to review the Opinion and Judgment to the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on August 31, 1976.

OPINIONS BELOW

Ninth Circuit: The Opinion of the United States Court of Appeals for the Ninth Circuit (*Kannisto v. The City and County of San Francisco* et al., No. 74-3193) in this case has been reported, and is set forth in Appendix A. See Appendix A—Petitioners Petition for Rehearing Denied.

District Court: The Memorandum and Order of the United States District Court for the Northern District of California is reported as Civil 73-0230 AJZ Order, Nov. 29, 1973 and Order of Dismissal August 9, 1974, and is set forth in Appendix B.

Administrative Hearing: San Francisco Police Commission. The original Decision in the Matter of Petitioner was made on Wednesday April 25, 1973. Part two (2), In the Matter of the Review of Decision in the Hearing of Petitioner on Wednesday, December 12, 1973. Both Decisions are located in Appendix C.

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 31, 1976.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

Why has the petitioner been denied his 1st Amendment Right of *"Free Speech"* to impart to his subordinates, as requested by them, *"Protected Public Testimony"* contained in a public record?

Why has the petitioner been denied his 14th Amendment Right of *"Due Process"*?

The right of the person affected thereby to be fully heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved, and *not to be denied the right to present his witnesses.*

Referring to the Police Commission Transcript of Wed., 11 April 1973, Page 112 Line 14 thru Page 114 Line 7; the Petitioner was not allowed to have the testimony given by his subpoenaed sworn and seated witnesses, which was in direct *violation of* the *due process clause* of the 14th Amendment of the U.S. Constitution.

Judge Eugene A. Wright and Judge J. Sneed (9th Circuit), concurring, were prejudicial where in their opinion they remarked, "being unpersuaded by any of the Appellant's arguments, we affirm the decision of the district court. The judges chose to honor the fallacious fabrications and falsehoods of the respondent, Deputy City Attorney, who had no evidence to substantiate his false accusations.

Judge Wright, in his order (staying issuance of mandate), filed on October 12, 1976, and said order being received by the petitioner on October 18, 1976, and which order being palpably injudicious, when the order allowed the Petitioner only 12 days for the preparation and submission to the U.S. Supreme Court, by October 29, 1976, for a Writ of Certiorari.

It was only through the Petitioner's personal inquiry, that the Petitioner discovered, that he was entitled to 90 days, to prepare the petition. It is incredulous, that JUDGE WRIGHT and JUDGE SNEED concurring had characterized the Petitioner's case as being insignificant and that it had the effect of clogging the judicial process.

The favorable outcome of Petitioner's case is of a monumental concern for all "HONEST AND STALWART POLICE OFFICERS" throughout the length and breadth of this nation, *WHO WOULD DARE TO "STAND TALL"* and expose reprehensible and criminal activity committed within their Police Departments.

Petitioner requests this Honorable Court to take notice that petitioner was denied due process as follows: Quote from U.S. District Court Record R/T Pg. 189 line 12 thru 19.

> MR. BEIRNE: Your Honor, (Judge Alfonso Zirpoli) My client informs he would like to address the Court. . . . .
>
> JUDGE ZIRPOLI: Who wants to address the Court?
>
> MR. BEIRNE: My Client (Petitioner Arvo W. Kannisto)
>
> JUDGE ZIRPOLI: *No*, I will permit you to argue the case if you want, for Legal Argument, but *I'M NOT GOING*

TO PERMIT YOUR CLIENT TO ADDRESS THE COURT.

UNQUOTE: Surely, this is a case of INJUSTICE and a VIOLATION of DUE PROCESS, as Petitioner was denied the right to defend himself and explain to the court that he was not attacking anyone, just merely reading "REQUESTED PROTECTED PUBLIC INFORMATION (CONTAINED IN A PUBLIC RECORD) TO HIS MEN." The Police Department records will confirm that the Captain of whom Petitioner read was not his or his subordinate's Superior Officer.

JUDGE ZIRPOLI was prejudicial in his decision as he states petitioner was attacking his Superior Officer and this constituted "hardcore conduct." This was untrue.

JUDGE ZIRPOLI, by his comments herein prejudiced Petitioner's case. In the matter of review of Police Commission decision, See: Appendix C Pg. 5 Line 18 thru 27.

MR. BEIRNE: and thirdly, my third motion, I would ask that I be permitted to let the defendant, Lt. Kannisto make a statement to the Commission and in conjunction with that, I would like to ask to put on two (2) witnesses, Officer Pera who was under the command of Lt. Kannisto at Mission Station at the time of the incident and the Lieutenant's present commanding Officer, Captain Conroy.

PRESIDENT GARNER: (Police Commissioner)

That motion, MR. BEIRNE, is also *DENIED.*

UNQUOTE Petitioner asks ? Where does an innocent man find Justice under these circumstances??

Our Judicial System, The Courts below, DENIED DUE PROCESS as the Petitioner was not allowed to testify to defend himself, or present witnesses in his defense.

Here again Police Commissioner Garner by his denial to allow petitioner and his witnesses to testify in his behalf also prejudiced Petitioner's case.

The revelation of this protected public testimony was requested of petitioner by his subordinates.

THIS REQUESTED PROTECTED PUBLIC TESTIMONY BY PETITIONER'S SUBORDINATES was read to them in a dispassionate and orderly manner, without elaboration or other comment.

The men were merely sitting on benches prior to going on duty; they were not being compensated for this time. There was no diatribe as suggested by the respondent. Diatribe Defined: "A bitter and violent denunciation" the truth of the matter is: there was no diatribe as irrationally claimed by the respondent, nor, was the reading of the requested public testimony directed to the petitioner's superior officer as fallaciously reported by the Respondent, Deputy City Attorney. The testimony read to Petitioner's subordinates concerned an individual who was not their Commanding Officer, nor, did he have any command authority over them.

The Respondent, Deputy City Attorney, had erroneously reported in his briefs that the individual of whom Petitioner had read was their Superior Officer, this was not true.

The Courts below have erroneously concurred with the fallacious and unsubstantiated arguments of the respondent. It is apparent there was collusion between the Deputy City Attorney and the Police Administration, as the Deputy City Attorney made no effort to contact any of Petitioner's subordinates and furthermore, in the District Federal Court neither *Judge Alfonso Zirpoli or the Deputy City Attorney were interested in having Petitioner's subordinates subpoenaed to testify in Federal Court as "requested by Petitioner" to "Get the Truth"*, relative to this matter. The record will further show that none of Petitioner's subordinates were ever subpoened by the Respondent to find the truth . . . Why to this juncture, Petitioner asks, has this severe encroachment upon the petitioner's 1st Amendment Right of "Free Speech" and the 14th Amendment Right of "Due Process" been so callously tolerated? An innocent man was falsely accused and railroaded, as substantiated by the records, stands at the portals of this Honorable Court and implores of this Honorable Court to restore to him the *"Precious Rights of Free Speech and Due Process"* which have been heretofore callously denied.

CONSTITUTIONAL PROVISIONS AND POLICE DEPARTMENT RULES INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States, as follows:

> *First Amendment:* "Congress shall make no law . . . abridging the freedom of speech . . ."
>
> *Fourteenth Amendment:* "Nor shall any state deprive any person of life, liberty or property without due process of law . . ." "Nor deny to any person within its jurisdiction the Equal Protection of the law".

(Rule 2.13 was the rule under which Petitioner was prosecuted)
San Francisco Police Department Rules 2.13 and revised Rule 3.89

(Rule 2.13)

> "Any breach of the peace, neglect of duty, misconduct or any conduct on the part of any member either within or without the State which tends to subvert the good order, efficiency or discipline of this Department or which reflects discredit upon the Department or any member thereof that is prejudicial to the efficiency and discipline of the Department, though such offenses are not specifically defined or laid down in these Rules and Procedures shall be considered unofficerlike conduct triable and punishable by the Board."

(Rule 3.89 had been adopted prior to Petitioner being prosecuted)
San Francisco Police Department Rule 3.89 (Revised Rule 2.13)

(Rule 3.89)

> "Any breach of the peace, neglect of duty, misconduct or any conduct on the part of any member either within or without the State which tends *substantially* to subvert the good order, efficiency or integrity of the Department, or that is *substantially* prejudicial to the efficiency and integrity of the Department, although such offenses are not specifically defined or laid down in these rules and procedures, shall be considered unofficer-like conduct, triable and punishable by the Board. Provided that in order to conclude that an offense constitutes unofficer-like conduct, the *Board must find a substantial and detrimental relationship* between the wrongful conduct in question on the one hand, and the interests of the Police Department in its efficient and effective operation on the other.

STATEMENT OF THE CASE

I have been a member of the San Francisco Police Department for some twenty-seven (27) years. (As of 1973) For twenty of those twenty-seven years, I have acted in a supervisory capacity, first as a sergeant of police, and for the last five years, I have been a Lieutenant of police. *At no time during my twenty-seven years of service have I been subject to any departmental disciplinary procedures.* I presently command a platoon consisting of seventy-one (71) police officers and five (5) civilian personnel at the Mission Station.

On or about December 20, 1972, I was directed to appear before the San Francisco Police Commission to give testimony concerning an appeal from a Chief's Suspension by Sgt. Donald Drake and my brother, Lieut. John Kannisto. The testimony which I was called upon to give concerned one, Captain Edward Laherty, and his conduct in relation to his subordinates. I was qualified to testify regarding said conduct, in that I served in Capt. Laherty's Command, as a Lieutenant of Police, on two prior occasions, first at the Taraval Police Station, and subsequently, at the Ingleside Police Station.

While serving as a Platoon Commander, under Capt. Laherty's supervision at the Taraval Station, he ordered me not to read the orders to the men of my platoon in direct contravention of Rule 8.111 of the Rules and Procedures of the San Francisco Police Department, which rule is as follows:

"8.111 (The Platoon Commander) Shall assemble his platoon fifteen (15) minutes before the hour of commencement of its tour of duty, call the roll, inspect the members and see that they are properly uniformed and equipped. Shall be responsible for their general appearance and shall, before sending them on patrol, give them their assignments or details, read the orders, bulletins and circulars affecting them and, if necessary, explain their provisions."

In addition to ordering this direct violation of a departmental regulation, the Captain ordered me to act as Station Duty Officer, an assignment which at that time was handled by patrolmen and is currently being handled by civilian personnel designated as "Station Officers." I advised the Captain that these orders were improper as I was bound by the rules and procedures of the Police Department and I intended to act in accordance with said rules.

The Taraval Police District covers an area of 11.39 square miles and has a population of 13,633 persons. On several occasions during the 11 p.m. to 7 a.m. watch, due to the Captain's interference with the proper deployment of personnel, the entire Taraval district was on occasion covered by one radio car, rather than the usual four radio cars, as required. In that I received no satisfaction from discussing the above-described matters with the Captain, and in accordance with departmental procedure, I advised the Supervising Captain of Police Districts, Jeremiah P. Taylor, of the difficulties which I was experiencing in attempting to properly run my platoon, and as a result thereof, I was transferred from Captain Laherty's command to the Richmond Police Station.

After serving for a period of time at the Richmond Police Station, I was transferred to the Ingleside Police District on July 20th, 1971, at which time Captain Harry Nelson was in command. I served under Capt. Nelson until March 22, 1972,

when Capt. Nelson was transferred to another assignment, only to be replaced by Capt. Laherty. Upon learning that Capt. Nelson was being replaced by Capt. Laherty, I immediately submitted a written request to be transferred to another command. I was advised by the Supervising Captain, Jeremiah P. Taylor, that my transfer would only be granted upon the condition that I secure another Senior Lieutenant of Police who desired to be transferred to Ingleside Station. I was unsuccessful in locating such an individual.

Upon assuming command of the Ingleside District, Capt. Laherty then commenced to issue verbal orders which were improper and in contravention to the rules and procedures and general orders of the Department. Since I could not fulfill the condition set by the Supervising Captain relative to a transfer, I contacted Chief Donald Scott and again sought a transfer. The Chief advised me he would take the matter up with the Supervising Captain, but I heard nothing further.

While under Capt. Laherty's supervision at the Ingleside Station, the Southeast Police Station was closed by order of the Police Commission and most of the personnel formerly assigned to Southeast Station were transferred to the Ingleside District, the latter district also assuming the responsibility of patrolling the major portion of what had formerly been Southeast District. Prior to the arrival of the additional personnel at the Ingleside Station, I had occasion to discuss the deployment of the personnel and equipment reassigned with the Captain. He apprised me that the foot beats along Third St. and along San Bruno Ave. were to be done away with. I advised the Captain that I had information that the Mayor's office had ordered that these beats be covered, due to the high incidence of crime that had previously occurred thereon. Subsequent to the arrival of the additional personnel, I assigned the men who had covered the

foot beats in question to those same beats. Capt. Laherty, upon learning of my action, asked why I had disobeyed his order. I advised the Captain of the Mayor's order and requested that if he wished to contravene the order of the Mayor to put said order in writing. Thereupon, I was advised that I was relieved of duty and that I should report to the office of the Chief. As this conversation occurred at 6:30 in the morning, I knew that the Chief was not on duty at this time so I placed a call to the Supervising Captain and was advised to remain at the Ingleside Station pending the arrival of Captain Taylor.

Upon the arrival of the Supervising Captain, I was directed to Capt. Laherty's office where Capt. Taylor asked me the nature of the problem. After advising the Supervising Captain of the difficulty, he stated that Capt. Laherty's order did not have to be in writing and that the Mayor was not running the Police Department. I was thereupon ordered from Capt. Laherty's office. After leaving Capt. Laherty's office, I resumed my duties as Platoon Commander and during my remaining days at the Ingleside Station, I continued to cover the foot beats in question. Shortly thereafter, I was transferred from Capt. Laherty's command.

It is evident, that Supervising Captain J. P. Taylor, had ordered Captain Laherty to maintain the aforesaid foot beats, the foot beats thereafter, were continued without interruption. Referring to Exhibit #4, in reply-brief, 9th Circuit Court of Appeals, Lieut. John Kannisto, (brother of Lieut. Arvo Kannisto) while under the command of Capt. Laherty and at a subsequent time, and there being a minimal amount of motorized patrol available, he omitted covering the aforesaid foot patrol beats. For this, he was up-braided and ordered to ground an additional motorized unit, in order to cover the aforesaid foot beats.

Subsequent to my transfer from the Ingleside Station, my brother, John Kannisto, who is also a Lieutenant of Police, was

given a one day suspension without pay at Capt. Laherty's request for approving a report made by a Sgt. Donald Drake, which report was allegedly incomplete. As I knew of Capt. Laherty's prior erratic behavior, I volunteered to testify on behalf of my brother, and Sgt. Drake, especially since I was aware that my previous protestations had been ineffectual when directed to those charged with the day-to-day administration of the department. I felt that the Police Commission should be fully apprised of the situation, since they are charged under Section 3.530 of the Charter of the City and County of San Francisco with the management of the Police Department.

My testimony before the Police Commission was as follows:

"I have personally written these, my remarks and they are mine alone.

I desire to read my remarks because they are most important and I do not want anything misinterpreted. I do have extra copies for all concerned.

With a total of over 20 years of supervisory service as a Sgt. and Lieut. in the S.F.P.D., I have always treated my subordinates and superiors, regardless of who they were, with courtesy, respect and dignity.

I wish to state that in the last 27 years in the S.F.P.D., I have worked for and with hundreds of different Captains and Lieutenants without collision.

I do not recall having ever worked for such an unreasonable, contrary, vindictive individual as Captain Laherty. He was responsible for requesting "unwarranted-suspension", days off without pay, for both Lt. John Kannisto and Sgt. Drake. This incident that brought about this hearing could have been avoided if the Captain had not given an improper order degrading the rank of Lieut. and Sgt., by ordering supervisory officers to do the work of a Building and Grounds guard. If there were no Security Guards available, a Patrolman should have been assigned these duties.

Inasmuch as the Lieut. was taken away from his usual duties on a busy Friday night, he was unable to check the report in question prior to the Sgt.'s reporting off duty.

Furthermore, Lieut. John Kannisto saw the omissions and placed a note on the report, to hold same until properly filled by the Sgt. Someone apparently unintentionally removed the Hold and Correct note attached to the signed report and forwarded the report to headquarters.

After I learned of Lieut. Kannisto's suspension, I inquired of Capt. Taylor, regarding this incident. Capt. Taylor, said he was unaware of any notes being attached to the original report. Capt. Taylor further remarked if this was so, Lieut. Kannisto has justification for requesting a hearing before the Police Commission to exonerate him from any suspension in this matter.

I have in the past while working as a subordinate (Lieut.) under Capt. Laherty's command, both at Taraval and Ingleside Stations, disobeyed several of his orders to me because they were improper or contrary to the rules and procedures of the Police Department. Just a couple of examples:

1. He ordered me out on patrol and ordered me to assign a Sgt. to do my work. I refused this order. I alone am responsible for the completeness and accuracy of my work. I have and do respond to major felonies and other required incidents.

2. I disobeyed his verbal order to do away with the combination foot and radio patrol beat on Third St., as well as the foot beat on San Bruno Ave. I told the Captain these foot beats were necessary. I further told him I wanted his order in writing so that I would not be held responsible for the crimes and complaints that would follow. 'What happened?' I was transferred out of his command. For your information, I had requested to be transferred out of his command prior to this incident, but was denied.

On several occasions during staff meetings, I have heard Capt. Taylor say, "Gentlemen, what's right is right and what's wrong

is wrong." In all fairness to the two men who are appealing the unfair, unreasonable suspensions, I hope the honorable Police Commission renders a favorable decision as regards these two appealing officers.

As regards Capt. Laherty, I and 99 percent of the personnel at Ingleside Station desire that he be relieved of his command; so that all of the personnel of Ingleside Station may have a Merry Christmas and a Happy New Year.

Capt. Laherty has forced many good, capable, senior subordinates into early retirement due to his unreasonable, belligerent, arrogant, contrary, and unpleasant behavior."

At the conclusion of the hearing before the Commission on December 20, 1972, the charges against Lieut. John Kannisto and Sgt. Donald Drake were sustained by the Commission and their suspensions upheld. I concluded that so long as a Senior officer brought charges against an inferior officer, regardless of the lack of foundation or reasonableness of said charges, the action of the Senior Officer would be sustained, not only by the Department's administration, but by the Police Commission as well.

As a Platoon Commander, with 71 police officers under my supervision, and as a member of the San Francisco Police Officers Association, I felt obliged to apprise my brother officers of the dangers which they faced should they disobey the orders of a superior officer, regardless of the properness or legality of such orders. I am convinced that I was obliged to make this disclosure to my men and the members of the Police Officers Association through the "Policemen", the official newspaper of the Association, and that anyone disobeying illegal orders would not only be subject to charges, but further they would be in danger of having those charges sustained by the Police Commission. Prompted by these considerations, and *requests* by my men, I read my testimony to my watch at the Mission Station as it appears above and I further requested that this testimony be published in the "Policeman"

verbatim. After completing my testimony on the day of December 20, 1972, and before the supervising Captain, Jeremiah P. Taylor, became aware of the reading of my testimony to my platoon, the following report was directed by Capt. Taylor to Chief of Police Donald M. Scott.

"Thursday, 21/12/72

Donald M. Scott
Chief of Police
Patrol Bureau Headquarters
Subject: Recommending Disciplinary Action against Lieut. Arvo W. Kannisto, Star No. 1234.

At the Police Commission meeting of Wed., 20 Dec. '72, in open hearing, while a witness under oath, Lieut. Arvo W. Kannisto, made statements that were inflammatory and disrespectful of Capt. Edward Laherty, written copies of these remarks were then passed out by the Lieut. to the ranking members of the department present. (copy attached)

This was unofficerlike conduct in that it was subvertive of the good order and discipline in the Department and constitutes a violation under Section 2.13 of the Rules and Procedures.

This conduct was disrespect of his superior and therefore a violation of Section 2.33 of the Rules and Procedures.

This conduct was adverse criticism of an official of the City and County of San Francisco and therefore is chargeable under Section 2.173 also.

This conduct if allowed to go unchallenged will undermine the discipline and reduce the control of every commanding officer in the department.

I recommend that Lieut. Arvo W. Kannisto be brought up on charges.

Attachment
(attachment consisted of my testimony as set forth)
From: Jeremiah P. Taylor, Sueprvising Captain No. 39"

I subsequently received an Inter-departmental Memorandum from the Supervising Captain wherein he asked me the following questions:

"1. Did you use departmental facilities to make copies of that statement that you passed out to the Police Commission meeting on 20 Dec. '72?

2. Did you while addressing the watch at 0745 hours on 21 Dec. '72 at that time, or any other time, read or relate to the men falling in or to other members, the material contained in your statement to the Police Commissioners on 20 Dec. '72?

3. Have you distributed written copies of that statement to any other members of this department?"

As to those questions, I submitted to Capt. Dermott Creedon, my Commanding Officer, the following reply as to Question No. 1: "Yes. I did use departmental facilities to reproduce copies of my testimony to the Police Commission. All copies were exhausted, given to the following persons: One (1) each to Police Commissioners. One (1) Chief of Police. One (1) Steno on duty at Commission hearing.

Furthermore, I had intended to give Supervising Captain Jeremiah Taylor a copy, but I did not have sufficient copies."

As to Question No. 2: "Yes. I did read my testimony given at the Police Commission hearing to members of my watch. I did this to alert and warn my subordinates to be aware of the consequences if they violated any rule or procedure of this police department, whether guilty or not guilty.

As to Question No. 3: "I had the Police Officers Association make a copy of my testimony before the Police Commission. This copy I advised them to use to publish the same to the Police Officers Association newspaper, along with the findings of the Police Commission so that all policemen would be aware of the Police Commission findings."

As a result of my conveying a copy of my testimony to the Police Officers Association and at my request, my remarks before the Commission were published in the January, 1973 issue of the "San Francisco Policeman."

As a result of this activity, I was charged by the San Francisco Police Department, which charges were served on me January 20, 1973, with two counts of violating Section 2.13 of the Rules and Procedures of the San Francisco Police Department, which section reads as follows:

"2.13 Any breach of the peace, neglect of duty, misconduct or any conduct on the part of any member either within or without the state which tends to subvert the good order, efficiency or discipline of the department or which reflects discredit upon the department or any member thereof or that is prejudicial to the efficiency and discipline of the department, though such offenses are not specifically defined or laid down in these Rules and Procedures shall be considered unofficerlike conduct triable and punishable by the Board."

Relative to the charges as set out against me that by virtue of my reading my testimony, which was a matter of public record, to my watch at the Mission Station, I violated said Rule 2.13 (cited above) and that I "... know(s) or should know, the avenues by which information may be forwarded to . . . (my) superiors to bring to their attention alleged dereliction in his superior;".

Prior to the bringing of these charges, I had on several occasions brought the derelictions of the Captain to the attention of my superiors, namely, the Supervising Captain, the Chief of Police and the members of the Police Commission without action being taken thereon. As stated above, my primary reason for bringing the activity of Capt. Laherty to the attention of the men under my command and to my fellow members of the San Francisco Police Officers Association, was to alert them to the fact that the disobedience of any order, legal or illegal, would cause the bringing of charges and the sustaining of said charges.

As to the second specification in the charges that I disobeyed orders which I ". . . did not deem proper". The fact of the matter is that not only did I "deem" the orders to be improper, but to my knowledge they were not only improper but illegal. As I understand Rule 2.45 of the Rules and Procedures of the San Francisco Police Department, the order of a superior officer is entitled to obedience when it is a "lawful" order. At no time, during my 27 years of service with the San Francisco Police Department, did I disobey a "lawful" order of a superior officer. Further, at no time during my 27 years of service with the San Francisco Police Department, did I encourage or otherwise foster the disobedience to "lawful" orders given by a superior officer. I feel that my reading of my *requested* testimony, which was already a matter of public record, to the officers under my command, as well as the publication of my testimony in the official newspaper of the Police Officers Association was an exercise of my First Amendment rights of freedom of speech and freedom of the press in so far as the matters to which I addressed myself were of interest to my men and all members of the San Francisco Police Officers Association.

A temporary restraining order was issued by Federal Judge Alfonso Zirpoli, after which he ordered that I be tried by the Police Commission. Petitioner was tried by the Police Commission, found guilty of violation of Rule 2.13, for reading "Protected" public testimony and publication of same in the Policeman Newspaper. Petitioner appealed the findings of the Police Commission to the U.S. District Federal Court, for the Northern District of California. Subsequently, *Judge Alfonso Zirpoli, ruled that the publication of Petitioner's testimony was constitutionally protected.*

Inasmuch as Judge Zirpoli ruled, that "only the Police Commission can interpret Rule 2.13, as regards freedom of speech, *reading requested "protected" public testimony to subordinates,"* and his denial to invalidate Rule 2.13 Petitioner had no other recourse, but to appeal to the Ninth Circuit Court of Appeals.

The Ninth Circuit Court erroneously ruled against Petitioner, relying only on the "Fabricated Briefs of the Respondents." No evidence was adduced by the Respondents or the Courts below to validate the findings.

The Respondent Deputy City Attorney has unscrupulously predjudiced my truthful protected public testimony, as *requested read by my men,* which testimony was given in a dispassionate and discrete manner without elaboration. The identical testimony given by Appellant before the San Francisco Police Commission.

The Deputy City Attorney did not have a single direct witness (or any other witness) to the reading of Petitioner's *requested* public testimony.

The Deputy City Attorney had the audacity to ascribe Petitioner's truthful public testimony as being a diatribe, (Diatribe: Bitter and violent denunciation).

The Deputy City Attorney had resorted to vilification of the most dastardly nature.

The Deputy City Attorney had resorted to fallacious hearsay of the most baseless nature.

The Respondent, Deputy City Attorney, had the audacity to malign the Petitioner, with his false fabrications contained in his briefs and he has thereby flouted the judicial process, which he has the obligation to uphold.

The Petitioner had testified truthfully and his testimony was indisputably corroborated, as located on pages 20A thru 20H of Petitioners 9th Circuit Court Brief, where 48 Police Officers on a subsequent occasion signed a petition which compelled the supervising Captain to remove Capt. Laherty from command of Police Officers on account of his reprehensible (unreasonable, contrary, vindictive etc.) behavior.

The malicious accusations contained in the briefs of the Respondent, Deputy City Attorney, are unsupportive of the evidence adduced in the courts below.

It is improper for the Courts to tolerate this type of conduct by an arm of the judicial system.

Petitioner has no protection under these unsavory conditions, tolerated by our judicial system.

The Deputy City Attorney had deliberately neglected to interrogate or question any of the Petitioner's subordinates who had *requested* of the Petitioner to read to them his "*protected public testimony,* given before the Police Commission (Administrative body), which was *a public record, pertaining to Police business.*

Petitioner's subordinates had a right to the disclosure of this public information, as it pertained to public records and Police business.

The Respondent *Deputy City Attorney* had resorted to the most vile character assassination. He in concert with the Police administration, had *fabricated a fraudulent case against the Petitioner.*

The distortions in the Deputy City Attorney's briefs in the Courts below boggles the mind. Never, in over 30 years in the field of Law Enforcement, have I seen a Defendant treated so shabbily. The fabricated case against the Petitioner, has been swallowed hook, line and sinker by the Courts below.

Petitioner's account of this case is absolutely the truth, as I and my subordinates had first hand knowledge of the entire gamut of what had occurred. It is incredible in that the Respondent Deputy City Attorney, had not a scintilla of direct evidence as to the reading of my *requested* public testimony (a public record) to my subordinates.

For the Courts to allow these vicious falsehoods by the Deputy City Attorney to prevail, will mark a black-day in the field of jurisprudence.

To this juncture, I have not received "Due Process Under the Law" to which I am entitled . . .

REASONS FOR GRANTING THE WRIT

The decision of the Ninth Circuit Court of Appeals conflicts with the decisions of this Honorable Court on the First and Fourteenth Amendments as per following Authorities, and Petitioner's evidence as here-in documented. *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967), like all citizens, they are guaranteed the right of "FREE SPEECH" by the FIRST AMENDMENT, and this includes the right to speak about their Governmental Employer.

Policemen like Teachers and Lawyers, are not relegated to a watered-down version of constitutional rights. "There are rights of Constitutional stature whose exercise a state may not condition by the exaction of a price". Assertion of FIRST AMENDMENT RIGHTS was mentioned specifically as sharing this Constitutional rank.

Pickering v. Board of Education, 391, U.S. 563 (1968). The Supreme Court unequivocally rejected the contention that Governmental Employees may constitutionally be compelled to relinquish their FIRST AMENDMENT RIGHTS they would otherwise enjoy as citizens to *comment on matters of Public Interest in CONNECTION with the OPERATION of the AGENCY for which they work.* The constitution requires that courts remain extremely sensitive to claims that Governmental action threatens the Public Interest in having FREE and UNHINDERED DEBATE ON: MATTERS OF PUBLIC INPORTANCE . . . the core value of the FREE SPEECH CLAUSE OF THE FIRST AMENDMENT.

SEE *Pickering v. Board of Education, supra* at 573.

FEDERAL JUDGE ALFONSO ZIRPOLI STATED IN PETITIONER'S CASE:

SEE: U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, R.T. Page 19, Line 22 thru 25.

"The Court is not prepared to hold that Rule 2.13 as interpreted, to prohibit all criticism of the Police Department except that made through departmental grievance procedures, is constitutional."
See R.T. Page 200 Line 23 thru 25.

"The Court further found that the use of Section 2.13 to punish Petitioner for publishing his statement in the "Policeman," (news-media) was *unconstitutionally overbroad.*

Muller v. Conlisk, 429 F.2d 901 (7th Cir. 1970)

Petitioner is of the opinion that Rules 2.13 and 3.89 as constituted contain provisions which infringe on Petitioner's constitutional protections, Petitioner attempted to bring up the issue of the veracity of the statements regarding the individual involved, and in conjunction with this he was refused the opportunity to adduce the testimony. Petitioner was saying that the matters asserted before the Police Commission were the truth, and in the rulings relative to the Cases, *Muller v. Conlisk*, there's some talk in those cases about the veracity of the individual making the allegations publicly. Here there was never any position taken by the Police Commission that Petitioner was untruthful. Petitioner contends that this Rule can be interpreted to inhibit his right of "Fredom of Speech and Due Process."

Keyishian v. Board of Regents, Supra, (20 L. Ed. 2d 811 at 818) (920 L. Ed. 811 at 821)

FINDING THAT NO QUESTION OF "DISCIPLINE BY IMMEDIATE SUPERIORS" NOR "DISHARMONY AMONG CO-WORKERS" (20 L. Ed. 2d 811 at 818) WAS PRESENTED. The Court held that for the purposes of the instant action the teacher was to be treated as if he were a member of the general public. (20 L. Ed. 811 at 818), or stated another way, that the SCHOOL BOARD HAD NO SPECIAL INTEREST SUFFICIENT TO LIMIT THE SPEECH IN QUESTION.

In PETITIONER'S CASE as in this case, there was NO SHOWING OF A DISCIPLINE PROBLEM by his superiors NOR DISHARMONY AMONG CO-WORKERS. PETITIONER'S CASE HAD the OPPOSITE EFFECT in that it BOOSTED the MORALE of the employees of the Department, by the mere

reading of his "Requested, Protected Public Testimony", (A Public Record) to his men.

Connally v. General Construction Co., 269, U.S. 385, 391 (1926)

Rule 2.13 and 3.89 of the Rules and Procedures of the San Francisco Police Department, "Conduct Unbecoming" vague, overbroad "catch-all" is patently unconstitutional in that it . . . "FORBIDS OR REQUIRES THE DOING OF AN ACT IN TERMS SO VAGUE THAT MEN OF COMMON INTELLIGENCE MUST NECESSARILY GUESS AT ITS MEANING AND DIFFER AS TO ITS APPLICATION."

Breier v. Bence, U.S. Supreme Court Decision No. 74-565

This is now the leading case with reference to "Police Department Rules" which are vague and overbroad, "Conduct unbecoming an officer and detrimental to the service." The 7th Circuit ruled in favor of the Police Officer and the U.S. Supreme Court concured with the 7th Circuit.

Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66, 83 S.C. 631, 9 Lawyers Edition 2d 584 (1963)

"Again, WE STRESS that plaintiff alleges a present infringement of his right to speak resulting from the mere existence of the allegedly over-broad rule and the threatened sanctions for its violation. The Supreme Court has repeatedly recognized that because freedoms of Expression in general . . . are vulnerable to gravely damaging yet barely visible encroachments.

". . . even on the assumption that his (Plaintiff's) conduct in the instant case was properly subject to departmental regulation by a narrowly drawn rule (as stated by the *Supreme Court in NAACP v. Button,* 371 U.S. 415, 432-433, 83 S.C. 328, 337, 9 Lawyers Edition 2d 405 (1963) O (T)he instant (rule) may be invalid if it prohibits privileged exercises First Amendment Rights whether or not the record discloses that the plaintiff has engaged

in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this court has not hesitated to take into account possible applications of the statute in other factual context besides that at the bar . . . The objectionable quality of vagueness and over-breadth . . . (is due to) the danger of tolerating, in the area of First Amendment Freedoms the existence of a penal statute susceptible of sweeping an improper application.

C. F. Marcus v. Search Warrant, 367 U.S. 717, 733, 81 S.C. 1708, 1717, 6 Lawyers Edition 2d 1127

THESE FREEDOMS are delicate and vulnerable, as well as SUPREMELY PRECIOUS IN OUR SOCIETY. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.

Cf. Smith v. California, supra, 361 U.S. 147 at 151-154, 80 S.C. 215, at 217-219, 4 L.Ed.2d 205; *Speiser v. Randall,* 357 U.S. 513, 526, 78 S.C. 1332, 2 L.Ed.2d 1460.

Because First Amendment Freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

Cantwell v. Connecticut, 310 U.S. 296, 311, 60 S.C. 900, 906, 84 L.Ed. 213. See also *Muller v. Conlisk (Supra),* 429 F.2d 901 at 903."

"In the instant case Rule 2.13 of the San Francisco Police Department stands as a "Threat of Sanctions" intended to inhibit the right of Policeman to speak as freely as other citizens on matters of public concern. It sweeps too broadly, it has the effect on inhibiting constitutionally protected speech. This is sufficient to establish his standing to challenge the Rule quite apart from any specific sanction which has been imposed upon him for its violation.

Button, supra, See also *Dombrowski v. Pfister,* 380 U.S. 479, 486-487, 85 S.C. 116, 14 L.Ed.2d 22, and *Soglin v. Kauffman,* 7 Cir., 418 F.2d 162, 166 (1969)."

Petitioner herein contends that what the Police Department is attempting to do is to regulate the right of a Police Officer to engage in free discussion of issues of importance to fellow members of the Department, by resorting to the vaguest Rule in the Rule Book, namely 2.13.

RULE 2.13 OF THE RULES AND PROCEDURES OF THE SAN FRANCISCO POLICE DEPARTMENT IS VOID FOR VAGUENESS AND IS PATENTLY UNCONSTITUTIONAL.

Defendants in their Memorandum of Points and Authorities argue that *Pickering v. Board of Education* (1968) 391 U.S. 563, 20 L.Ed2d 811, 88 S.Ct. 1731 governs in that the Police Department has a governmental interest which must be balanced against plaintiffs' right of free speech. However, it must be remembered that in Pickering (supra) the statements made by the plaintiff therein were inaccurate. In the instant case, the issue of accuracy did not arise as Lt. Kannisto was prepared to fully litigate that issue before the Police Commission. As Lt. Kannisto's defense counsel sought to adduce testimony corroborating his allegations, the prosecutor objected and the testimony was excluded by virtue of the Commission's ruling. *Flynn v. Giarusso,* 321 F. Supp. 1295, 1298 (1971), "the fact that . . . (Kannisto) is a policeman and, as such a public employee, does not, in itself, muzzle him from criticizing the department." The fact that he was punished for his criticism, even though truthful, certainly constitutes an infringement upon his constitutional rights and he should be accorded the remedies sought here for his protection and the protection of the class of policemen similarly situated.

ARGUMENTS CONTROVERTING OPINION OF THE U.S. NINTH CIRCUIT COURT "OPINION"

No. 74-3193, Dated: August 31, 1976

U.S. CIRCUIT JUDGE EUGENE A. WRIGHT and JUDGE J. SNEED (CONCURRING) *See: Appendix "A"*, 9th Circuit Opinion, Pg. 1 Line 4 thru Pg. 2 Line 5.

Petitioner, KANNISTO merely READ public testimony which was a *"Protected Public Record", Testimony,* which was *requested by his subordinates.* This public record which had previously been reported to the S.F. Police Commission, was *protected public speech under* the *First Amendment.* This *testimony read* was a *truthful account,* a true picture of the individual concerned.

It is erroneously reported by this opinion, that the individual described was Petitioner and Petitioner's subordinate's Superior Officer. This is an erroneous (false) statement.

The records of the Police Department will confirm (prove) that Petitioner and subordinate's Superior Officer was Captain DERMOT CREEDON, as listed on front cover of this opinion (Defendants-Appellees)

See Appendix "A" Page (Pg. 2 Line 3 thru 5)

Another erroneous (false) account by this opinion. At a *prior time* at a *prior command*, Petitioner, KANNISTO served under the command of the individual here-in mentioned. Who at that time gave Petitioner KANNISTO *"improper orders"* in violation of Police Department Rules. Petitioner KANNISTO, at that time was not disciplined because he complied with the Department Rules as ordered violated by this Captain.

See: Appendix "A" Page 2 Line 18 thru 22

Petitioner here argues that the Police Commission did unconstitutionally apply the "catch-all" Rule 2.13 to punish Petitioner for exercising his First Amendment right of Free Speech when Petitioner was merely reading protected public testimony which was *requested by his subordinates* and which testimony was contained in a public record.

See Appendix "A" Page 3 Line 1 thru 4

Cox v. Louisiana, 379, U.S. 536, 558, 85 S.Ct. 453, 13 L.Ed. 2d 471 (1965)

The information read by Petitioner to his subordinates was of a *"valid public interest"*, and his subordinates had *a right to hear* this *"Protected Public" information they had requested.*

See also *Bence v. Breier,* 501 F. 2d 1185, 1192 (7th Cir. 1974)

Indeed, the Supreme Court has made it clear that "Policemen, like teachers and lawyers (and unlike Military Personnel, *Parker v. Levy,* 417 U.S. 733, 758-60 (1974), are not relegated to a watered-down version of Constitutional Rights" *Garrity v. New Jersey,* 385 U.S. 493, 500 (1967).

See: Appendix "A", Page 4 Line 1 thru 10

It is erroneously (falsely) herein reported that Petitioner communicated disaffection of his superior to his subordinates. This again is a false observation by this opinion as the Ninth Circuit Court was relying on the fabrication presented by the Respondent, Deputy City Attorney, to the Courts below.

The individual of whom Petitioner read was not his superior or his subordinates superior nor had he any command authority over us. Neither Petitioner nor subordinates were answerable or subject to command authority or any other contact by this individual in any manner whatsoever.

See: Appendix "A" Page 4 Lines 21 thru 25.

It is erroneously inferred that Petitioner's statement (testimony, "protected public record") read by Petitioner to his men at their request caused a discipline problem, which affected the esprit de corps.

To controvert this (false) allegation and observation, the Petitioner presents the following testimony, evidence (proof) from the documents, brief below.

See: R/T Federal Court Page 154 Lines 14 thru 21.

> "MR. BEIRNE: Q. Chief, At about the time that the article was published in the San Francisco Policeman, the Newspaper, can you tell me if you as Chief of Police that there

> were problems of discipline among the members of the San Francisco Police Department as a result of the publication of that article?"
>
> A. *"NO".*

Chief Scott admitted that Petitioner's reading of public testimony requested by his men was not disruptive of Police operations.

Petitioner desires that this Honorable Court pay particular attention to the following testimony given under oath before the San Francisco Police Commission, by Capt. Taylor, this testimony should absolve Petitioner of any violations of any Rules within the San Francisco Police Department.

Shelton v. Tucker, 364 U.S. 479, 488, 81 S. Ct. 247, 252, 5 L. Ed. 2d 231 (1960)

Hence, it can be seen from the foregoing cases, the par-military nature of a Police Department does not authorize said agency to legislate rules which incur upon the right of a member to exercise his rights under the First Amendment, unless said rules are very narrowly drawn and the member is reasonably put on notice of exactly what type of activity is being curtailed. In the instant case, Rule 2.13 of the Rules and Procedures of the San Francisco Police Department, is so overly-broad that any act regardless of its nature could foreseeably be punished by the Department as a violation of said Rule.

Rule 2.13 of the Rules and Procedures does not set forth any conduct which it deems punishable, but provides sanctions for just about any conduct imaginable.

See: R/T San Francisco Police Commission hearing of LIEUT. ARVO KANNISTO, date 14 Mar. 73 (Yr. 74 error) Page 52 Line 23 thru Page 53, Line 8.

> "Q. I see now Captain Taylor, relative to the testimony and the reading to his watch at the Mission Station and the

publication of "The San Francisco Policeman": you state that you received complaints from various commanders of the district stations relative to problems with their men as a result of this?

A. (Capt. Taylor) *No.* I did not receive any complaints that were directly connected with this particular incident.

Q. (Capt. Taylor) has Capt. Laherty contacted you and told you that as a result of this testimony he's having difficulty administering his command at Ingleside Station?

A. (Capt. Taylor) *NO.* He has not told me.

Q. (Capt. Taylor) Has anyone in the Traffic Detail informed you that they're having difficulty controlling their men as a result of this testimony?

A. (Capt. Taylor) *NO. NOBODY HAS TOLD ME THAT."*

The evidence clearly confirms that Respondent, Deputy City Attorney, was unaware of the "star chambered proceedings" of the would be "untouchables", the *Former* Corrupt POLICE COMMISSION, who took it upon itself to punish Petitioner for exposing the truth.

Petitioner is greatly disturbed in that the Courts below failed to see the true reason, the underlying truth, why Petitioner was ordered brought up on charges by the *"cover-up-man"*, who himself has been demoted for his "Autocratic behavior", and his personal friend Captain Laherty, found guilty and suspended for violations of specific Police Department Rules and Procedures.

Capt. Taylor confirmed by his testimony in Federal Court that he had committed perjury as a sworn witness before the San Francisco Police Commission. This perjury was also confirmed by Chief Scott in Federal Court. Supervising Capt. Taylor, ordered Petitioner brought up on charges when Petitioner exposed his character, informing the Police Commission, that he was a "personal friend", and "cover-up-man", for Capt. Laherty.

PERJURY BY SUPERVISING CAPTAIN TAYLOR

Quote of R/T Page 20 Line 11 thru 15, of the San Francisco Police Commission Administration Hearing of Lieut. Arvo Kannisto.

"Q. *Capt. Taylor,* Relative to the charges that were brought against Lieut. Kannisto, you had made up your mind that *you wished Lieut. Kannisto charged for the very testimony* that *he gave before this Commission, didn't you?*

THE WITNESS: (Capt. Taylor) A. *NO* SIR."

R/T Page 22 Line 1 thru 3

"Q. Capt. Taylor, and that opinion was made merely on the basis that he gave testimony here, and nothing else, was it not?

A. *NO—NO".*

CONFIRMATION OF PERJURY IN FEDERAL COURT

Quote of R/T Page 113 Line 3 thru Line 9 of Federal Court Record, Date: 29 October 1973.

"Q. Capt. Taylor, then after listening to that testimony, is it not a fact on the following morning of 21 Dec. 1972, that you addressed what is determined an intra-departmental memorandum to Chief Scott of the Police Department, requesting that Lieut. Kannisto be brought up on charges for the testimony that he gave before that Commission?

A. The Witness, Capt. Taylor, *YES I DID."*

THE EVIDENCE IS HERE, THE PROOF IS CLEAR, EVEN PERJURY COMMITTED BY CAPT. TAYLOR IN HIS BURNING DESIRE TO ORDER PETITIONER BROUGHT UP ON CHARGES FOR EXPOSING HIM AND HIS "COVER-UP" BEFORE THE COMMISSION; YES, HE ORDERED PETITIONER CHARGED BEFORE HE EVER READ THAT "PROTECTED PUBLIC TESTIMONY" TO HIS SUBORDINATES AS REQUESTED BY THEM.

See: Appendix "A" Page 5 Line 5 thru 7

It is erroneously (falsely) referred to by the Ninth Circuit Court, that Petitioner and his subordinates, were in close daily contact, with the individual referred to in his protected public testimony, a public record.

The Petitioner wishes again to reiterate, that this individual (Capt. Laherty) who was referred to in the statement, had absolutely no daily contact or any contact whatsoever with the Petitioner or his subordinates. Here again the Deputy City Attorney, Respondent, has erroneously misguided the Courts below, by the fabrication in his briefs.

See: Appendix "A" Page 5, Line 15 thru 19

The Ninth Circuit Court is erroneously inferring, that the Petitioner's statement, "A Protected Public Record", (READING OF) impeded the Petitioner's performance of his daily duty, or interefered with the regular operation of his department. This is a callous misrepresentation of the true facts involved.

See: Appendix "A" Page 5 Line 20 thru 29

Here again the Ninth Circuit Court, is erroneously inferring, that the Petitioner and his subordinates, were in close daily contact with the individual mentioned in Petitioner's statement (A Protected Public Record). The truth of the matter is, that the Petitioner and his subordinates, had no contact whatsoever, with the individual involved.

At the time that the *requested Public Testimony* was read, (Public Record) there was no formation, or inspection, the men were merely sitting on the benches. There was no disruption of any kind whatsoever, as a result of having read my *requested* "Protected" Public Testimony.

There is substantial evidence available in the briefs of the Courts below, to prove Petitioner's innocence.

See: Appendix "A", Page 5 Line 30 thru Page 6 Line 4

Ninth Circuit Court questions, as to whether the information imparted by the Petitioner was of vital decision making, by those concerned with Departmental Operations.

The *information* imparted to his subordinates by Petitioner was *important* and was vital to those legitimately concerned with Departmental operations.

The *individual of whom Petitioner read was creating a serious morale problem.*

Petitioner informed the Police Commission of this morale problem and Petitioner's *subordinates requested information regarding this problem.* Petitioner informed his subordinates at their request, on this vital subject, as numerous other subordinates had retired because of this Captain's reprehensible conduct.

This Captain who was creating a morale problem was removed from the Command of the Station involved; transferred to another Command again relieved from that Command, due to his reprehensible conduct and violations of "specific" Rules and Procedures for which he was "suspended."

At the time Petitioner read his statement, This Captain, was not our Commanding Officer, or Superior Officer, nor had he any command function over us, nor were we in close daily contact, nor were we answerable to him in any manner.

See: Appendix "A", Page 6 Line 13 thru 15.

The Ninth Circuit Court Opinion, that Petitioner argues, that his conduct was unprotected, is a preposterous assertion, as Petitioner had at no time argued, that his conduct under the First Amendment was unprotected. Petitioner further argues, that Rule 2.13 was nevertheless unconstitutionally applied in the instant case. Petitioner has herein provided the proof, evidence to show that his conduct was constitutionally protected.

The *Ninth Circuit Opinion contains five (5) erroneous references intimating* that *Petitioner's statement was directed* to *his*

Superior Officer. Petitioner reiterates, that the Captain of whom he read, *was not* his or his subordinates Commanding Officer, or Superior Officer, nor had he any command function over us, nor were we in close daily contact, (No contact), nor were we answerable to him in any manner.

See: Appendix "A", Page 6 Line 16 thru 20.

The Ninth Circuit Opinion in reference to Police Department regulations being entitled to considerable deference in maintaining an efficient organization, it was not the intent and purpose of this Rule, to deny Petitioner, "Freedom of Speech", when reading "Protected Public" testimony, (Public-Record) and the denial of the Petitioner to expose reprehensible and criminal activity within his Police Department.

See: Appendix "A", Page 6 Line 23 thru 32.

The Ninth Circuit Opinion is in error, as the statement read, was not read during the regular performance of duties, this non-duty period of time, which was not compensated for, which was used by the Petitioner, has since been eliminated entirely by the Police Department. This period prior to the regular performance of duties, was unjustified, as the officers had not been compensated therefor. This was the period, time, used by the Petitioner, to read his "Protected Public Testimony", Public Record.

This *reading of* the *"Public Record"*, was *plainly appropriate*, as it *pertained to our profession* and it was a *"valid public interest"*. Petitioner has herein proved, by the evidence adduced from the briefs, from the Courts below, that there was *"NO" disruptive influence,* but rather it *served to "Boost the Morale"* and for the Department to take remedial action, which they took to improve the service.

This vague, overbroad, "catch-all", 2.13 Rule, has inappropriately been used on numerous other occasions against fellow

officers, in other than, constitutional issues. The use of the same Rule in the Petitioner's case involved a violation of his First and Fourteen Amendment Rights which had brought the Rule to the attention of the Federal Courts.

The Ninth Circuit Court opinion states, Quote: "WE CANNOT, WITH ONLY KANNISTO'S CHALLENGE, AS A PREDICATE, INVALIDATE THE REGULATION FOR OVERBREADTH.

The Rule is not only challenged by the Petitioner, but it is also challenged by the San Francisco Police Officers Association.

See: C/R for Ninth Circuit, Page 67 Line 24 thru Page 68 Line 2

Quote: "Wherefore, Petitioners herein PRAY for Declaratory judgment as follows:

> THAT THE COURT DECLARE THE RESPECTIVE RIGHTS AND DUTIES OF PETITIONERS AND RESPONDENTS UNDER RULE 2.13 OF THE RULES AND PROCEDURES OF THE SAN FRANCISCO POLICE DEPARTMENT AND THAT BY SAID DECLARATION AND JUDGMENT IT BE DECLARED THAT SAID RULE IS UNCONSTITUTIONAL IN THAT IT IS VOID ON ITS FACE AND HAS NO APPLICATION TO PETITIONER KANNISTO OR OTHER MEMBERS OF THE SAN FRANCISCO POLICE DEPARTMENT SIMILARLY SITUATED, AND THAT APPLICATION OF SAID RULE TO PETITIONER KANNISTO'S ABOVE DESCRIBED ACTIVITY IS UNCONSTITUTIONAL, INVALID, AND VOID."

VERIFICATION

"I am the President of the San Francisco Police Officers Association, one of the Petitioners in the above entitled action, and make this verification on behalf of said Association: I know the contents of the foregoing amended complaint and declare that the same is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 18 July 1973, at San Francisco, California."

s/GERALD A. CROWLEY
Gerald A. Crowley, President
San Francisco Police Officers Assoc.

Petitioner, Kannisto does not stand alone, in his challenge of Rule 2.13 as stated in the Ninth Circuit Court Opinion. For verification see face page of the Ninth Circuit Court Opinion, which includes the San Francisco Police Officers Association, Plaintiffs-Appellants.

See: C/R U.S. District Court for Northern District of California Page 192, Line 21 thru Line 23.

Petitioner wishes to make the following observation of the "Vaugeness" of Rule 2.13 as follows:

(Judge Zirpoli) "The challenged Rule already has been authoritatively interpreted by the Police Commission, the only body that can interpret it."

It is apparent there is some question "of vagueness" in the minds of the San Francisco Police Commission. It is apparent that the Police Commission is awaiting the Court's decision on the constitutionality of Rule 2.13, as presented by the Petitioner's case.

The newly adopted Rule 3.89, being similar to Rule 2.13, has the word "substantially" inserted at three (3) locations. The adopted Rule 3.89, is presently being held in abeyance.

Either Rule in the opinion of the Petitioner, is vague and overbroad and does not conform to constitutional standards, as applied to Petitioner's case.

Surely this Rule 2.13 *must be vague,* when *Judge Zirpoli states: Only the Police Commission can interpret it, and they themselves have seen fit to change the rule.*

See: Appendix "A" Page 7 Line 13 thru 22

It is erroneously (falsely) herein reported that petitioner communicated a disparaging attack on his Superior Officer. This again is a false observation by the Ninth Circuit Opinion, as the Ninth Circuit was relying on the fabrication presented by the Respondent, Deputy City Attorney to the Courts below. The individual of whom Petitioner read WAS NOT his Superior or his subordinates Superior, nor had he any Command Authority over us . . . . Neither Petitioner or subordinates were answerable or subject to Command Authority or any other contact by this individual, in any manner whatsoever.

See: *Appendix "A" Page 7 Line 23 thru 25*

In the instant case the Ninth Circuit has relied on the fabrication presented by the Respondent, (Deputy City Attorney), to the Courts below. The Respondent has distorted the true account of the instant case and the courts below have concurred with this false report without any substantive evidence.

Petitioner wishes to inform this Honorable Court, that Petitioner and his witnesses were denied the right to testify in the Courts below as follows: Referring to the Police Commission Transcript of Wed., 11 Apr. 1973, Page 112 Line 14 thru Page 114 Line 7; the Petitioner was not allowed to have the testimony given by his Subpoenaed Sworn and Seated Witnesses, which was in DIRECT VIOLATION of the DUE PROCESS CLAUSE OF THE 14th AMENDMENT of the U.S. CONSTITUTION.

See: *Police Commission Hearing R.T.* Date 12 Dec. 1973, Page 5 Line 18 thru Line 27.

"MR. BEIRNE: and thirdly, my third motion, I would like to renew that also. I WOULD ASK THAT I BE PERMITTED TO LET THE DEFENDANT, Lieut. Kannisto, MAKE A STATEMENT TO THE COMMISSION and in conjunction with that, I would like to ASK TO PUT on TWO (2) WITNESSES, Officer James Pera who was under the command of Lieut. Kannisto at the Mission Station at the time of the incident and the Lieut.'s Present Commanding Officer, Capt. J. William Conroy.

President Garner: (Commissioner) That MOTION, Mr. Beirne, is also DENIED. NOTE: Here is direct "Evidence and Proof" from the Court record of one of Petitioner's subordinates, who was present when Petitioner read his requested "Public Testimony" (Protected Public Record) to his subordinates. Police Officer James Pera, was one of the officers present who requested that this information be read to them.

See *Police Commission* R/T Date: 11 April 1973, Page 136 Line 7 thru Page 137 Line 17.

(QUESTIONS ANSWERED BY OFFICER PERA)

"Q. And since the time that he has made that reading to his watch, have you seen any decrease in the morale with the men at the Mission Police Station relative to their performance of Police work?

A. NO, I HAVEN'T.

Q. Have you noticed any change in the attitude as a result of that?

A. I HAVEN'T NOTICED ANY CHANGE. In the attitude adversely. I know that the men that work for Lieut. Kannisto are very proud to work for him and they are quite aware that he is an honest man and that he is fair and that he is a fine example for all the subordinates.

He is the LEADER that leads the men. He is very capable. The men follow him because he doesn't have to tell the men what to do. They do it because they respect his judgment and THERE HAS BEEN NO DECLINE IN MORALE as a result of anything Lieut. Kannisto has said.

Q. Relative to the Mission Station where Lieut. Kannisto was assigned at the time he read to the watch or that he published the article in the newspaper, have you noticed any indication or even any indication by men in your watch that they were prone to disobey orders?

A. *NO.*

Q. Now, what, if any, reaction did you get from the men at the Mission Station relative to Lieut. Kannisto being brought up on charges?

A. The men were highly upset and indignant to the fact that Lieut. Kannisto has been brought up on charges.

Q. And what, if any, action was taken by the men at the Station relative to bringing him up on charges?

A. I, We, I instituted two (2) petitions; circulated one of them around Mission Station and if you will let me read it, I'll read it period.

Q. Fine.

A. "WE THE BELOW SIGNED MEMBERS OF MISSION STATION ARE SIGNING THIS PETITION ON BEHALF OF LIEUT. ARVO KANNISTO. WE FEEL THAT LIEUT. KANNISTO IS A CAPABLE, FAIR AND IMPARTIAL LEADER. WE BELIEVE HE IS AN ASSET TO THE SAN FRANCISCO POLICE AND WE ARE PROUD TO WORK WITH HIM.

Not one man that I approached with this petition refused to sign it. *I HAVE ONE HUNDRED THIRTY TWO (132)* SIGNATURES."

QUOTE: "(WHEREUPON, Petition dated 12/30/72 received and marked as Exhibit S for identification)".

U.S. District Court, for Northern District of California, R/T Page 189, Line 12 thru 19.

"MR. BEIRNE: Your Honor, (JUDGE ZIRPOLI) . . . MY CLIENT *(KANNISTO)* INFORMS HE WOULD LIKE TO ADDRESS THE COURT.

I have informed him I will make the request of the Court.

THE COURT: Who wants to address the court?

MR. BEIRNE: My Client.

THE COURT: NO, I will permit you to argue the case if you want, for legal argument, but I'M NOT GOING TO PERMIT YOUR CLIENT TO ADDRESS THE COURT. Petitioner requested permission of the Courts, indicated above, to testify and clarify, that he was not attacking anyone, but was merely reading a "REQUESTED PUBLIC RECORD," requested by his men, and the individual of whom he read, was not his Superior Officer . . .

PETITIONER WAS DENIED DUE PROCESS, AS HE WAS NOT ALLOWED TO TAKE THE STAND IN ORDER TO CLARIFY THE TRUE CHAIN OF EVENTS IN THIS CASE.

The reading of the REQUESTED PROTECTED PUBLIC TESTIMONY, A "Public Record" to my men at their request and the use of Rule 2.13 (Conduct Unbecoming) to punish me was "unconstitutionally applied" for the following reasons:

1. I was not attacking my Superior or any other Superior Officer.
2. I was merely reading requested Public Testimony (Public Record) to my men, as REQUESTED by them.
3. This True Public Testimony, A Public Record, was given the night previous in an open public hearing.
4. I read this Testimony in a dispassionate, judicious manner without elaboration.
5. This cannot by any stretch of the imagination be intrepreted as hardcore.
6. We were not in an official formation, there was no inspection or formal assembling, my men were merely sitting on the benches.
7. This reading to my men AT THEIR REQUEST was prior to their reporting on their duty assignments.
8. It is an absolute lie that the Petitioner was making a bitter criticism or violent denunciation of anyone. The word diatribe is a misrepresentation.

9. The records of the Courts below, briefs, clarify and prove without a shadow of doubt that the above statements are true.
10. The evidence presented in the Courts below, proved that the Petitioner was railroaded on false charges, for exposing reprehensible conduct, criminal activities and the "cover-up" by Petitioner's accuser, Capt. Taylor, who ordered these false charges against me.

Rule 2.13 has no application in the instant case as the Respondent presented to the Courts below a distorted and fabricated account regarding the true facts of this case.

See: Appendix "C" DECISION OF HEARING OF LIEUT. ARVO W. KANNISTO Date, 25 April 1973, Page 2 Line 2 Thru 7

COMMISSIONER GARNER: "At the outset the Police Commission wishes to make it perfectly clear that it is the duty of every member while appearing under oath as a WITNESS BEFORE the COMMISSION to TELL the TRUTH WITHOUT EVASION, and we further unequivocally state that NO MEMBER WILL BE SUBJECT TO ANY DISCIPLINARY CHARGES FOR ANY SUCH TESTIMONY."

UNQUOTE: CHIEF OF POLICE DONALD SCOTT, TESTIFIED in FEDERAL COURT that Supervising CAPTAIN TAYLOR REQUESTED that PETITIONER BE BROUGHT UP ON CHARGES FOR HIS very TESTIMONY BEFORE the POLICE COMMISSION. CHIEF SCOTT, further testified, HE REFUSED THAT "FIRST" REQUEST, and CHIEF SCOTT, also testified in Federal Court under Oath that CAPTAIN TAYLOR, had requested of him (2nd request) to bring Petitioner "Up On Charges" when he had learned PETITIONER had READ, AS REQUESTED BY HIS SUBORDINATES, "The identical testimony he had presented the evening previous to the Police Commission, as a subpoenaed, sworn witness. CHIEF SCOTT, testified in Federal Court, "HE ALSO DENIED THAT SECOND REQUEST."

See: Appendix "C", POLICE COMMISSION REMAND HEARING OF LIEUT. KANNISTO, Date 12 Dec. 1973, Page 5 Line 21 thru 25.

MR. BIERNE: (COUNSEL FOR PETITIONER)

> "Just to refresh your recollection in the matter, it's a faite accompli now, you will recall WHEN he (PETITIONER) READ TO HIS WATCH "NO" CHARGES were FILED AGAINST HIM and subsequently WHEN he PUBLISHED it in the paper, at that time the CHARGES WERE FILED AGAINST HIM."

Supervising Captain Taylor, who ordered these false unjustified charges against Petitioner, personally urged the Editor of the Police News Media not to publish that testimony. The Editor informed Capt. Taylor that he could not deny the Petitioner, The "FREEDOM OF THE PRESS", the testimony was published.

When the "Protected Public Record", Petitioner's testimony, was published and appeared in the Police News Media, then CAPT. TAYLOR requested of CHIEF SCOTT (3rd REQUEST) to file charges against Petitioner. Finally CHIEF SCOTT predicated his approval of the filing of charges based on the publication in the Police News Media.

See: Appendix "C" DECISION OF HEARING OF LIEUT. KANNISTO, date 25 April 1973, Page 2 Line 8 thru Line 11

> (COMMISSIONER GARDNER): "The Commission further recognizes that criticism, suggestions and comments by members of the Department are essential in the process of continually improving the services rendered to the public."

Page 2 Line 19 thru 22

> ". . . and the discipline that we will impose is not being imposed for what the LIEUT. said, but the forum (Place) in which he chose to make his remarks."

CAPT. TAYLOR had requested of CHIEF SCOTT, (2nd REQUEST) to bring Petitioner up on charges for his imparting

truthful disclosures to his subordinate, when this information was REQUESTED BY THEM. Chief Scott, testified in Federal Court he refused Capt. Taylor's 2nd Request to bring Petitioner Up on charges for his reading to his watch. Police Commissioner Garner stated the petitioner was not punished for what he said, rather he was punished for Forum (place) where he read his protected public testimony, A PUBLIC RECORD.

This was not an official formation as already elucidated in the records of the Courts below. The petitioner is of the opinion he is being denied his First Amendment right of "FREEDOM OF SPEECH", when he was disciplined for imparting truthful disclosures Protected Public Testimony to his subordinates, when this information was REQUESTED BY THEM.

The Respondent Deputy City Attorney had erroneously misguided the Courts below, by the fabrications in his briefs, without any documentary evidence. It is evident the Courts below were misguided by false information, contained in the Respondent's briefs.

Petitioner has here-in documentary evidence and "PROOF" that the Ninth Circuit Opinion is loaded with false and misleading information. This opinion must be controverted as such a false document of "Opinion" in Case-Law, is a miscarriage of Justice and is not acceptable.

CONCLUSION

The Petitioner was denied the protection of the First and Fourteenth Amendments, Freedom of Speech and "Due Process", before the courts below, as they overlooked substantial evidence and misapprehended the true facts as follows.

THE COURTS BELOW FAILED TO TAKE NOTE THAT:

A. Petitioner's witnesses were not allowed to testify in his behalf.

B. Perjured testimony was freely given by Petitioner's accuser.

C. A fraudulent document was forwarded to the District Federal Court by the Police Administration.

D. Prejudicial fallacious and unsubstantiated information was placed into the Court records below by Respondent.

E. Substantial evidence presented by Petitioner was either overlooked or misapprehended by the Courts below.

F. The unilateral extraction of references to Respondent's briefs and total disregard with reference to Petitioner's truthful disclosures documented with substantial evidence within his briefs.

G. That the submission of testimony by Petitioner was abridged before the Police Commission and District Federal Court.

H. Without any evidence to prove to the contrary the Courts below have cited with the fallacious briefs submitted by the Respondent.

I. The R/T (Reporters Transcripts) prove, Petitioner was improperly ordered brought up on charges, not for his actions before his subordinates, but rather for: Exposing Supervising Captain Taylor as a "cover-up-man" relative to the "unofficer-like-conduct" of Captain Laherty.

J. The R/T prove, the Respondent did not have a scintilla of evidence to prove his contrived false accusations.

The proof for all ten (10) points above is documented (located) within the briefs from the Courts below, is most relevant, and was overlooked or misapprehended by the Ninth U.S. Circuit.

"This is truly a miscarriage of Justice in the Courts below. . . ."

Petitioner and his fellow members of the San Francisco Police Officers Association, contend that the existence of Rule 2.13 of the Rules and Procedures of the San Francisco Police Department imposes on its active members each of whom is a uniformed employee of the San Francisco Police Department, a "gag" in that said members as "reasonable men" cannot anticipate what behavior will violate Rule 2.13 being that said Rule prohibits every form of activity imaginable, whether such activity is objectively reprehensible or not.

Petitioner, Appellant desires a declaration of his rights and the rights of those similarly situated with respect to the validity of said Rule with particular reference as to whether Petitioner's activities are violative of the said rule. Petitioner asks the Court to make a declaration of such rights and duties and as to the validity and constitutionality of said Rule as applied to Petitioner.

Petitioner used the grievance procedure by bringing his grievance directly to the Police Commission. The Commission chose not to inquire into the charges that I had made before it, but rather chose to cover-up for the derelictions of Captain Laherty. Petitioner had the witnesses to prove the charges and the Commission in order to spare embarrassment for the administration refused to hear Petitioner's witnesses, who would have corroborated Petitioner's every charge to the fullest. The Police Commission gives the appearance of a Court but does not operate under the conventional rules of evidence as in a regular judicial proceeding.

It is most frustrating, absolutely incredible; how a corrupt Police Commission, could be so "hard-core" and determined to punish an innocent man. This was a frame-up, a "railroading" of an innocent man who would dare to speak-out and speak only the truth. All the evidence produced, proved beyond a shadow of a doubt, Petitioner was innocent. The prosecution could only produce, cover-ups, lies, "perjury", and fallacious semantics to railroad an innocent man who would dare to *"stand Tall"* and *"expose"* only the *"truth"*.

The examples of CASE-LAW PRESENTED by the Respondent in the INSTANT CASE have NO BEARING with the issues before this Honorable Court.

This is a clear-cut case of FRAME-UP and RAILROADING OF AN INNOCENT MAN with false unsubstantiated charges,

as herein proved by evidence, by Petitioner. PETITIONER ASKS THIS HONORABLE COURT TO REVIEW THE ENTIRE RECORD OF THE COURTS BELOW TO FIND PROOF OF ANY ALLEGED GUILT.

Appellant is not asking for an accommodation for himself alone, but for all stalwart, honest and honorable present and future Law Enforcement Officers and other Civil Servants who live and work in fear of losing pay and employment due to these "CATCH-ALL" type rules that MUZZLE "FREEDOM OF SPEECH", "FREEDOM OF EXPOSURE OF WRONGS AND COVER-UPS OF CRIMINAL ACTIVITY." The Petitioner before this Honorable Court is seeking a declaration that his 1973 conviction by the San Francisco Police Department was constitutionally invalid under the First and Fourteenth Amendments, and he requests that the conviction be expunged from the Police Department records and that he recover all pay, benefits and cost of litigation lost by reason thereof.

Petitioner further requests that this Court unshackle the Honest Police Officer who is constantly under pressure not to "Speak Out" when he has knowledge of crimes and cover-ups committed by his Superior Officers or others of influence.

The Rules such as Rules 2.13 and 3.89 of the San Francisco Police Department, which threatens Honest Police Officers and keep them in fear of loss of employment when it is indicated that they should expose the wrongs and cover-ups committed in the Police Department. Petitioner himself, as an example of what can occur when an Honest Policeman speaks out, telling only the truth and being honest and straight forward. Petitioner was suspended for fifteen (15) days without pay (constituting a fine of $750.00) by a Police Commission who would rather save the Department embarrassment than uncover Police practices which are reprehensible.

Petitioner and his fellow officers request that Rules 2.13 and 3.89 of the San Francisco Police Department be declared unconstitutional as they are merely instruments for choking honest criticism within the San Francisco Police Department.

Petitioner reiterates that the GOAL OF LAW IS TRUTH, and if he is punished for speaking truthfully, then that Goal is subverted.

The Respondents, Police Commission and the Deputy City Attorney are without any supporting evidence to rely on in order to prove their false accusations of improper conduct by the Petitioner. Nowhere within the briefs of the Courts below can there be found any evidence adverse to the Petitioner.

It is evident that the supporting documents, preponderance of evidence "all evidence" is in substantial support of the Petitioner.

Petitioner begs of this Honorable Court to order the entire record from the courts below and to scrupulously examine the entire gamut of the documents in this case, I have profound misgivings, that this has been done in the Courts below.

It is evident Petitioner has been denied the protections afforded by the First and Fourteenth Amendments.

FOR THE REASONS HEREINABOVE STATED, IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR WRIT OF CERTIORARI BE GRANTED. . . .

Dated: January 14, 1976

ARVO W. KANNISTO, *Petitioner*
(In Propria Persona)

(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

Arvo W. Kannisto and the San Francisco Police Officers Association, *Plaintiffs-Appellants,* **vs.** The City and County of San Francisco, a municipal corporation, Donald M. Scott, Chief of the San Francisco Police Department, Jeremiah P. Taylor, Supervising Captain of the San Francisco Police Department, Washington Garner, Richard Miller and Marvin Cardoza, members of the San Francisco Police Commission, *Defendant-Appellees.*	No. 74-3193

OPINION

(August 31, 1976)

Appeal from the United States District Court
for the Northern District of California

Before: WRIGHT and SNEED, Circuit Judges, and LUCAS,* District Judge.

WRIGHT, Circuit Judge:

Plaintiff-appellant Kannisto, a lieutenant in the San Francisco Police Department (department), made disrespectful and disparaging remarks about a superior officer while addressing his subordinates during a morning inspection. He described his supe-

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*Honorable Malcolm M. Lucas, United States District Judge, of the Central District of California, sitting by designation.

rior as a most "unreasonable, contrary, vindictive individual," whose behavior was "unreasonable, belligerent, arrogant, contrary and unpleasant." Kannisto also said that his superior officer had given him improper orders on several occasions, which Kannisto had intentionally disobeyed.

For this action[1] he was suspended from duty for 15 days, pursuant to then-existing Department Regulation 2.13. That regulation provided:

Any breach of the peace, neglect of duty, misconduct or any conduct on the part of any member either within or without the State which tends to subvert the good order, efficiency or discipline of this Department or which reflects discredit upon the Department or any member thereof, or that is prejudicial to the efficiency and discipline of the Department, though such offenses are not specifically defined or laid down in these Rules and Procedures shall be considered unofficerlike conduct triable and punishable by the Board.

Kannisto brought this action on behalf of himself and others under 42 U.S.C. & 1983 and 28 U.S.C. & 1343(3). He argued that the regulation was unconstitutionally applied, and was overbroad and vague. The district court dismissed the action for failure to show a violation of a constitutional right. We affirm.

This court has previously set forth the guidelines by which we determine whether, in a context such as this, the regulated expression is protected. We stated in Phillips v. Adult Probation Department, 491 F.2d 951, 954-55 (9th Cir. 1974):

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1. The department originally cited as an alternate reason for suspension the publication by Kannisto of his opinions in a newspaper of the San Francisco Police Officers Association. The district court held that this publication was constitutionally protected (see Hanneman v. Brier, 528 F.2d 750 (7th Cir. 1976), and remanded the case to the Police Commission as it could not determine what weight the Commission had given to the invalid reason.

On remand the Commission upheld the suspension solely on account of the statements made by Kannisto to his subordinates in the course of official duty. The district court thereupon dismissed the action, and this appeal followed.

It is well settled that First Amendment rights of expression are not absolute, and that regulation as to time, place and manner of exercise is proper when reasonably related to a valid public interest, Cox v. Louisiana, 379 U.S. 536, 558, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965). While "(t)he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected". Keyishian v. Board of Regents, 385 U.S. 589, 605-606, 87 S.Ct. 675, 685, 17 L.Ed.2d 629 (1967), "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed. 811 (1968). The problem "is to arrive at a balance between the interests of the (public employee), as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees." Id. (Brackets in original, footnote omitted.)[2]

It may be that the department does not have the identical interest in developing "instant unquestioning obedience" among its employees as does a military organization. Dwen v. Barry, 483 F.2d 1126, 1129 (2nd Cir. 1973), rev'd on other grounds sub nom. Kelley v. Johnson, ... U.S. ....., 96 S.Ct. 1440 (1976). See also Bence v. Brier, 501 F.2d 1185, 1192 (7th Cir. 1974). Indeed, the Supreme Court has made it clear that "policemen, like teachers and lawyers (and unlike military personnel, Parker v. Levy, 417 U.S. 733, 758-60 (1974), are not relegated to a watered-down version of constitutional rights." Garrity v. New Jersey, 385 U.S. 493, 500 (1967).

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2. Cf. Kelley v. Johnson, ... U.S. ....., ..., 96 S.Ct. 1440, 1447, (1976) (Powell, J., concurring).

It is true, though, that the department has a substantial interest in developing "discipline, esprit de corps and uniformity," Kelley v. Johnson, supra, ... U.S. at ..... 96 S.Ct. at 1445, to insure "adequate promotion of safety of persons and property." Id. See also Dwen v. Barry, supra, 483 F.2d at 1129. Certainly a prohibition against the communication of an officer's disaffection to rank-and-file members of the department during regular duty hours may be considered as a necessary adjunct to the department's substantial interest in maintaining discipline, morale and uniformity.

The interest asserted by Kannisto is his right to comment on matters of public concern pertaining to the operation of the department of which he is a part. Cf. Pickering v. Board of Education, 391, U.S. 563, 568, (1968). The district court noted, and we agree, that in the abstract Kannisto's right is substantial because, as a member of the department he is a person "extraordinarily able to inform the public of deficiencies in this important governmental department." Cf. Pickering at 572.

Also weighing in the balance along with Kannisto's individual right is the right of the public to be informed. Id. at 573.

To determine that application of the regulation herein comports with the First Amendment, we must find that the department's interest in discipline, esprit de corps, and uniformity on these facts outweights the interests of the public and of Kannisto in the particular statements made.

The Court's decision in Pickering provides considerable guidance. The plaintiff in Pickering was a teacher discharged for submitting a letter to the local newspaper criticizing school board budgetary policies. The Court found that the public statement at issue related to a matter of general public concern and that "the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication." 291 U.S. at 574. The Court concluded that no particular state interest

arising from the employment relationship was at stake and that Pickering was therefore entitled to the same First Amendment protection afforded the general public.

The Pickering Court noted:

> The statements (were) in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent (were) not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence (were) necessary to their proper functioning.

The Court also emphasized that it was not shown, nor could it be presumed, that the statements at issue "in any way either impeded the teacher's proper performance of his daily duties in the classroom, or . . . interfered with the regular operation of the schools generally." 391 U.S. at 572-73. (Footnote omitted.)

The facts in this case sharply contrast with those in Pickering. Here, Kannisto's comments were directed against one under whose direction he worked in close daily contact. Questions of discipline and harmony are clearly presented here. Kannisto's diatribe, delivered as it was before his men while in formation for inspection, can be presumed to have had a substantial disruptive influence on the regular operations of the department. Cf. Phillips, supra, 491 F.2d at 955-56. The department's conclusion was this was the case is entitled to considerable deference. Kelley v. Johnson, ... U.S. at ....., 96 S.Ct. at 1445.

Moreover, we query whether the information imparted by Kannisto was "vital to informed decision-making" by those legitimately concerned with the department's operations. Pickering,

391 U.S. at 572. While the nature of the information imparted by Kannisto may not affect the strength of his asserted right, it is in our view relevant to consideration of the substantiality of the public's interest in being informed.

Finally, it is clear to us that Kannisto exercised his asserted First Amendments rights, not as a member of the general public, as in Pickering, 391 U.S. at 572, but as an officer of the department. In this respect his rights are simply not the same as those asserted in Pickering. See Phillips, supra, 491 F.2d at 955.

For the reasons expressed, we conclude that the department has not unconstitutionally applied its regulation to protected conduct.

Kannisto also argues that even if his own conduct was unprotected, the department's regulation was nevertheless unconstitutionally overbroad. We disagree.

We reemphasize our belief that police department regulations, while perhaps not directly analogous to those of the military service, are entitled to considerable deference because of the state's substantial interest in creating and maintaining an efficient organization to carry out the important duties assigned by law. Kelley v. Johnson, ... U.S. at ..... & n.11, 96 S.Ct. at 1445 & n.11.

This factor reinforces our conclusion that Kannisto's statements, made as they were during the regular performance of his duties, were so plainly inappropriate and disruptive that they were without doubt beyond the pale of protection afforded by the First Amendment. Moreover, the department's regulation appears to proscribe a wide range of similiar or related conduct. Accordingly, even though the department might possibly apply the regulation to some conduct ultimately to be held protected,[3] we cannot, with only Kannisto's challenge as a predicate, invalidate the regulation for overbreadth. Cf. Parker v. Levy, 417 U.S. at 760-61.

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3. See note 1 supra.

Kannisto also challenges the regulation as being unconstitutionally vague. Again, we disagree. While the language of the regulation, "unofficerlike conduct" which "tends to subvert the good order, efficiency or discipline of (the) Department" may be susceptible to vagueness challenges in some contexts, it is clearly not vague as applied to the facts of this case.

As Justice White stated, writing for the Court in Colten v. Kentucky, 407 U.S. 104, 110 (1972): "The root of the vagueness doctrine is a rought idea of fairness." The test for vagueness is whether " 'citizens who desire to obey the statue will have no difficulty in understanding it . . . .' " Id., quoting Colten v. Commonwealth, 467 S.W. 2d 374, 378 (Ky. 1971).

In our view there could be no reasonable doubt on Kannisto's part that a disparaging attack on his superior officer, communicated to patrolmen in the regular course of duty, would tend to "subvert the good order, efficiency or discipline of (the) Department." See Bence v. Breier, supra, 501 F.2d at 1195 (Jameson, J., concurring in part and dissenting in part). Cf. Parker v. Levy, 417 U.S. at 757; Allen v. City of Greensboro, 452 F.2d 489, 491 (4th Cir. 1971). A fortiori, Kannisto could scarcely have doubted that his remarks would reflect "discredit upon" a member of the department.

Since the regulation clearly applies to Kannisto's conduct, he cannot challenge it for facial vagueness. Parker v. Levy, 417 U.S. at 756.

Being unpersuaded by any of appellant's arguments, we affirm the decision of the district court.

SNEED, J. (Concurring):

I concur in Judge Wright's opinion.

This case presents an almost classic confrontation between the need to establish and maintain the efficiency of a particular activity of the state and the values of free speech protected by the First Amendment. The Constitution does not prohibit an accommoda-

tion of these interests. Nor should an accommodation in most instances require the intervention of the slow and somewhat ponderous federal judiciary. A society which accepts no accommodation save that mandated by a federal court is neither strong nor happy. Moreover, such reliance on the federal courts slowly saps their strength. Inevitably they become but another suspect meadiative institution indistinguishable from those they supplanted. We have not reached that point as yet. Being required to intervene in cases such as this, however, contributes little to our avoidance of this fate.

In the United States Court of Appeals
For the Ninth Circuit

Filed—Sep 29 1976

No. 74-3193

Arvo W. Kannisto and the San Francisco Police Officers Association,
Plaintiffs-Appellants,

vs.

The City and County of San Francisco, a municipal corporation, et al.,
Defendants-Appellees.

ORDER

Before: WRIGHT and SNEED, Circuit Judges, and LUCAS, District Judge.

Appellant's Petition for Rehearing has been considered and is denied.

DATED:

United States Court of Appeals
For the Ninth Circuit

No. 74-3193
DC #CV-73-230 AJZ

Arvo W. Kannisto,
Plaintiff-Appellant,
vs.
The City and County of San Francisco, et al.,
Defendants-Appellees.

Filed—Oct. 12, 1976
s/ Emile Melfi, Jr. Clerk
U.S. Court of Appeals

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Arvo W. Kannisto, Pro Per counsel for the Appellant, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellant herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before October 29, 1976.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

s/Eugene A. Wright
United States Circuit Judge.

Appendix B

Filed—Nov. 29, 1973

United States District Court
For the Northern District of California

No. C-73-0230 AJZ

Arvo W. Kannisto, etc., et al.,
Plaintiffs and Petitioners,
vs.
The City and County of San Francisco, etc., et al.,
Defendants and Respondents.

ORDER

Plaintiff, a San Francisco policemen, on behalf of himself and members of the San Francisco Police Department, has brought this action pursuant to Title 42, United States Code section 1983. In essence, the suit attacks regulations of the San Francisco Police Department restricting the free speech of members of the police force.

The immediate controversy centers aroung comments by plaintiff about his superior, Captain Eward Laherty. On December 20, 1972, plaintiff testified at a Police Commission hearing concerning charges made against his brother, Lieutenant John Kannisto, who was also a San Francisco policeman. In part the statement he made described Captain Laherty as the most "unreasonable, contrary, vindictive individual" plaintiff remembers having worked under, asserted that Captain Laherty gave improper orders on several occasions, which plaintiff intentionally disobeyed, and described Captain Laherty's behavior as "unreasonable, belligerent, arrogant, contrary and unpleasant." The statement also called for relieving Captain Laherty of his command of Ingleside Station.

Plaintiff then disseminated substantially the same statement in two other forums. First, on December 21, 1972, plaintiff assembled the men in his platoon prior to the beginning of their tour of duty to inspect and instruct them, as required by regulations, and during this formation he read a statement of the testimony he had given before the Police Commission. Thereafter, plaintiff also caused a copy of this statement to be published verbatim in the San Francisco Police Officers Association publication "Policeman."

As a result of his reading the statement to his men and causing it to be published, disciplinary charges were brought against plaintiff. When this court denied plaintiff's motion for a preliminary injunction, the Police Commission heard the charges and found plaintiff guilty of violating Rule 2.13, which provides:

> Any breach of the peace, neglect of duty, misconduct or any conduct on the part of any member either within or without the State which tends to subvert the good order, efficiency or discipline of this Department or which reflects discredit upon the Department or any member thereof, or that is prejudicial to the efficiency and discipline of the Department, though such offenses are not specifically defined or laid down in these Rules and Procedures shall be considered unofficerlike conduct triable and punishable by the Board.

In the course of reaching its decision in Plaintiff's case, the Commission stated its interpretation of the expansive language of Rule 2.13. The view the Commission expressed is that the Rule does not prohibit a police officer from stating anything, including criticism of his superior officer, so long as the comments are made exclusively in complaints through channels within the Police Department, such as testifying before the Police Commission. Because plaintiff read his comments to his platoon and caused them to be published, the Commission suspended him for 15 days.

Plaintiff now asks the court to review that decision. He contends that Rule 2.13 is unconstitutionally overbroad and vague. Although it is not certain, plaintiff also seems to argue that he cannot be punished in any case, because his conduct was constitutionally protected by the first amendment.

Defendants suggest that the court should abstain and require plaintiffs to litigate this matter in the state courts. The challenged rule already has been authoritatively interpreted by the Police Commission, the only body that can interpret it. The only remaining questions are whether the rule as interpreted by the Commission is constitutional and whether plaintiff's conduct may constitutionally be punished. The Supreme Court has left no doubt that in such circumstances a federal court may not abstain. See, *e.g.*, *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498 (1972).

"(P)olicemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). Like all citizens, they are guaranteed the right of free speech by the first amendment, and this includes the right to speak about their governmental employer. In *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Supreme Court unequivocally rejected the contention that governmental employees may constitutionally be compelled to relinquish the first amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the agency for which they work. At the same time, the court recognized that certain restrictions on the speech of governmental employees might be proper. "The problem in any case is to arrive at a balance between the interests of the (employee), as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Id. at 568.

Under *Pickering* the court believes that the Police Department plainly can prevent police officers from using official formations during duty hours as a forum for attacking superior officers. Moreover, such conduct is so plainly inappropriate that it is the sort of "hard core" violation that would obviously be prohibited by any construction of Rule 2.13. Therefore, even if the rule is unconstitutional on its face, plaintiff could constitutionally be punished for his acts, (See *Dombrowski v. Pfister*, 380 U.S. 479, 491-92 (1965) and the court in this case cannot substitute its judgment for that of the Police Commission; nevertheless, the responsibility of making that particular finding and reaching that conclusion was that of the Police Commission, and in this respect Rule 2.13 is not overbroad.

A more difficult problem is presented by applying Rule 2.13 to punish the act of causing a statement, substantially the same as one given in public testimony, to be printed in a newspaper. In *Fisher v. Walker* 464 F.2d 1147 (10th Cir. 1972), publishing comments in a newspaper was found to be grounds for disciplining a public employee under *Pickering* test. There, however, the district court first found that the statements were issued during a volatile situation, they were false, they were divisive, disruptive and detrimental to the Department's discipline, and, importantly, they concerned a matter of departmental rather than general public interest. At this time the court certainly cannot make findings of fact, such as these, which would justify a holding that plaintiff's act of publishing his statement in the "Policeman" is not constitutionally protected.

Additionally, absent further justification, the court is not prepared to hold that Rule 2.13, as interpreted to prohibit all criticism of the Police Department except that made through departmental grievance procedures, is constitutional. The Constitution requires that courts remain extremely sensitive to claims that governmental action threatens the public interest in having free and unhindered

debate on matters of public importance—the core value of the free speech clause of the first amendment. See *Pickering v. Board of Education, supra* at 573. Here defendants claim the right to prohibit nearly all public criticism—including all criticism made in the public press—of the Police Department by its members, persons extraordinarily able to inform the public of deficiencies in this important governmental department. While this regulation is slightly narrower than the regulations of other police departments struck down in *Muller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970), and *Flynn v. Giarrusso*, 321 F. Supp. 1295 (E.D. La. 1971), the difference is not so great as to convince the court that these cases are inapposite. The regulation is constitutionally overbroad when applied to the act of publishing criticism in the newspaper "Policeman," which is of sufficient circulation to constitute a news medium, albeit specialized. Such conduct is certainly not so improper as to be "hard core" and cannot be published under such regulation. Moreover, in the instant case the article was a verbatim publication of the statement as made at the Commission hearing, a public hearing, and it was published without elaboration or other comment.

It therefore appears that the court is faced with a situation in which the plaintiff was disciplined for two reasons, only one of which has been shown to be a constitutionally valid ground. Because the court cannot determine what the Commission would have done solely on the basis of the constitutional ground herein found, it remands the case to the Commission to reconsider the matter in the light of the rulings herein made; and it is so ordered.

The court will retain jurisdiction of this matter and directs the defendants to report the result of the remand herein made within 45 days of the date hereof.

IT IS THEREFORE ORDERED that this action is remanded to the Police Commission for further proceedings in light of the court's opinion. IT IS FURTHER ORDERED that the court will retain juris-

diction, and defendants are directed to report the result of the remand within 45 days of the date hereof.

Dated: November 29, 1973

s/ Alfonso J. Zirpoli
United States District Judge

Appendix B

In the United States District Court
Northern District of California

No. C 73-0230 AJZ

CIVIL

MONDAY AUGUST 5, 1974

Arvo W. Kannisto

vs.

The City and County of San Francisco

MOTION TO REVIEW POLICE COMMISSION DECISION

Counsel please state their appearance for the record.

MR. BEIRNE: William Beirne on behalf of Petitioner Kannisto.

THE COURT: Are you gentlemen ready to submit this matter?

MR. CHOUTEAU: Rene Chouteau on behalf of the defendants.

MR. BEIRNE: Your Honor, in light of the briefs that have been submitted on behalf of Lieutenant Kannisto, I would be willing to submit it. I don't think there's much more to be said. The law is there before the Court, and I am sure Your Honor has had an opportunity to read it.

MR. CHOUTEAU: We will submit it, Your Honor.

THE COURT: All right, I will give you an order now, then. The reporter will take it. This is an order denying petitioners' motion to review.

Petitioner is a San Francisco Poleceman charged with violating Section 2.13 of the Rules and Procedures of the San Francisco Police Department; I have a footnote in connection with that which sets forth the rule—for making a highly critical statement about his superior, Captain Edward Laherty, to the men in his

platoon prior to their tour of duty on December 21, 1972, and publishing it in the San Francisco Police Officers' Association publication, the "Policeman." After the charges were filed, he brought this action pursuant to 42 USC Section 1983, claiming Section 2.13 is unconstitutionally vague and overbroad and that his conduct was constitutionally protected under the First and Fourteenth Amendments to the Constitution of the United States.

The Court refused to enjoin the disciplinary proceedings, and on April 25, 1973, the San Francisco Police Commission found petitioner had violated Section 2.13 and ordered him suspended for 15 days.

The matter was once again heard by this Court, and after two days of hearings, on November 29, 1973, the Court issued a memorandum opinion and order holding that petitioner's use of an official formation as a forum for attacking his superior officer constituted "hardcore" conduct punishable by the Police Department even if Section 2.13 were unconstitutionally vague and overbroad on its face. However, the Court further found that the use of Section 2.13 to punish petitioner for publishing his statement in the "Policeman," was unconstitutionally overbroad. Thus, the Court concluded:

"It therefore appears that the Court is faced with a situation in which the plaintiff was disciplined for two reasons, only one of which has been shown to be a constitutionally valid ground. Because the Court cannot determine what the Commission would have done solely on the basis of the constitutional grounds herein found, it remands the case to the Commission to reconsider the matter in the light of the rulings herein made; and it is so ordered."

The order itself provided that the cause was "remanded to the Police Commission for further proceedings in light of the Court's opinion."

As a result of the Court's remand, the Police Commission met on December 12, 1973, to reconsider its previous rulings in the light of this Court's opinion. Petitioner's counsel's request for a full hearing, for preparation and review of the transcripts of the earlier hearing, and to call three witnesses, including petitioner, were all denied. The Commission then unanimously determined that petitioner be suspended for 15 days on the basis of his statement made before the members of his platoon. This is determination was embodied in a resolution filed with the Court on December 26, 1973.

Now, some seven months later, petitioner moves for a review of the decision of the San Francisco Police Commission. It is obvious from the motion and petitioner's affidavit that what he requests is that this Court hold an essentially de novo hearing on the charges for which he was disciplined. This Court has repeatedly indicated it cannot and will not do. "The Court in this case cannot substitute its judgment for that of the Police Commission." Order of November 29, 1973, at Page 4. The Court did not specify any particular procedure for the Police Commission to follow on remand and did not require any adjustment be made in the penalty imposed. In this instance, the Commission had already held one plenary hearing; further evidence and testimony was not necessary.

The Court concludes, therefore, that the Commission acted properly in its December 26, 1973, hearing; as previously indicated, disciplining petitioner for reading his statement before the members of his platoon was constitutionally permissible under any interpretation of Section 2.13.

The authority cited by petitioner in support of full review of the Commission's decision, Strumsky versus San Diego County Employees Association, 11 Cal 3d 28 (1974), concerns State constitutional and statutory law and State review procedures only, and is inapposite in this Federal civil rights action.

Petitioner's belated claim that the men of his platoon were not being paid and therefore were not "on duty" when he made the statement in question, is equally meritless. Not only is it not for this Court to reexamine the facts as found by the Commission, but regardless of whether the men were being paid or not, they were assembled for an official formation, and petitioner's conduct is no less improper because it was made to officers who were not being paid by the City and County of San Francisco at that moment.

It is therefore ordered that petitioner's motion for a review of the San Francisco Police Commission's December 26, 1973, decision is denied and this action is dismissed. Counsel for respondent is directed to prepare a judgment in accordance with Local Rule 23.

All right, gentlemen, thank you.

CERTIFICATE OF REPORTER

I, ELDON N. RICH, the undersigned Official Reporter of the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California, do hereby certify:

That the foregoing transcript, Pages 1 through 203, inclusive, constitute a true, full and correct transcript of my shorthand notes taken as such Official Reporter of the proceedings hereinbefore entitled, and reduced to typewriting to the best of my ability.

s/ ELDON N. RICH

Official Reporter, U.S. District Court
San Francisco, Calif. 94102

Appendix C

Before the
Police Commission of the City and County of San Francisco
State of California

Decision on Hearing of
LIEUTENANT ARVO W. KANNISTO

Proceedings of

WEDNESDAY, APRIL 25, 1973
5:35 P.M.

COMMISSION MEMBERS:
HON. WASHINGTON GARNER, Presiding
HON. MARVIN CORDOZA (not present)
HON. RICHARD MILLER

DEPARTMENT MEMBERS:
HON. DONALD M. SCOTT
Chief of Police

FOR THE ACCUSED:
WILLIAM T. BEIRNE, Esquire
O'Byrne and Beirne
1255 Post Street
San Francisco, California 94109
Telephone: 441-7637

WEDNESDAY, APRIL 25, 1973 5:35 P.M.

THE SECRETARY: Going to Item No. 14, skipping Item No. 13 decision on hearing of Lieutenant Arvo Kannisto.

MR. BEIRNE: Ready on that matter, gentlemen.

COMMISSIONER GARNER: How are you?

MR. BEIRNE: Good evening.

COMMISSIONER GARNER: Well, I guess I'll just read this to you.

MR. BEIRNE: Fine.

COMMISSIONER GARNER: At the outset the Police Commission wishes to make it perfectly clear that it is the duty of every member while appearing under oath as a witness before the commission to tell the truth without evasion, and we further unequivocally state that no member will be subject to any disciplinary charges for any such testimony.

The Commission further recognizes that criticism, suggestions and comments by members of the Department are essential in the process of continually improving the services rendered to the public; however, we also recognize that adequate channels exist within the Department to bring any such matters to the attention of persons who can properly deal with these problems.

The decision relative to Lieutenant Kannisto is based only on the charges brought by the Department and not on any testimony given by Lieutenant Kannisto at the hearing of his brother on December 20, 1972.

We find Lieutenant Arvo Kannisto guilty of violating Section 2.13 of the Rules and Regulations, and the discipline that we will impose is not being imposed for what the lieutenant said, but the forum in which he chose to make his remarks. In addressing his watch the morning following his testimony before the Commission and in causing the article to be published in the Association newspaper, we find he encouraged disobedience and agree that his conduct was prejudicial to the good order and efficiency of this Department. In addition, the verision of his testimony which he read to his watch and caused to be published was different from the oral version he gave at the hearing.

We also find that it was unnecessary for him to take these actions since adequate channels existed to bring this matter to the attention of the proper parties.

We, therefore, suspend Lieutenant Kannisto for 15 days, beginning tomorrow.

MR. BEIRNE: And this is for violation on how many counts of Rule 2.13 of the Rules and Procedures, Mr. Commissioner?

COMMISSIONER GARNER: On all of them.

MR. BEIRNE: All counts.

(Whereupon, the matter was concluded.)

s/ Dorsey A. McTaggart, C.S.R.

Official Court Reporter
San Francisco, California

Appendix C

Before the Police Commission
of the
City and County of San Francisco

In the Matter of the Review of Decision in the hearing of

ARVO W. KANNISTO, Lieutenant of Police

REPORTER'S TRANSCRIPT

Wednesday, December 12, 1973

COMMISSION MEMBERS:
HON. WASHINGTON GARNER, Presiding
HON. MARVIN CARDOZA
HON. RICHARD MILLER

SGT. WILLIE FRAZIER, Secretary
FOR THE DEPARTMENT:
CAPT. GEORGE EIMIL

FOR THE ACCUSED:
WILLIAM T. BEIRNE, Esq.
1255 Post Street
Suite 850
San Francisco, California
(415) 441-7635

Hall of Justice
San Francisco, California

WEDNESDAY, DECEMBER 12, 1973 4:00 O'CLOCK P.M.

MR. BEIRNE: As you know, a little history of the case that—

COMMISSIONER MILLER: Excuse me one moment.

MR. BEIRNE: If I may. On October 30, 1973, Federal Judge Alfonso Zirpoli issued an order in regard to this case and remanded this back to this Commission for further proceedings, and I would like to point out to the Commission that a part and

parcel of Judge Zirpoli's opinion, on page 6 thereof, he says that "policemen like teachers and lawyers are not relegated to a watered down version of constitutional rights".

I think in regard to that pronouncio by Judge Zirpoli I would move the Commission at this time to grant a full hearing in the matter of Lt. Kannisto, and failing to get a full hearing in the matter of Lt. Kannisto, I would secondly ask that this Commission order the transcripts that could be prepared in regard to this case as it was reported and review those transcripts without, before making a final determination. And in the event the Commission does not wish to rehear or review it, I would further suggest at this time, I would be entitled to put two witnesses on the stand, one being Officer PERA and the other being Lt. Kannisto's present Commanding officer, Captain CONROY, and in addition, the defendant himself, and then after such time or whatever the Commission will rule, we will abide by it and make a determination as to what further steps we would take in regard to Judge Zirpoli's order.

CAPTAIN EIMIL: The Department opposes Mr. Beirne's motion. On page 9 of Judge Zirpoli's order, he says that: A court is faced with a situation in which the plaintiff, Lt. Kannisto, was disciplined for two reasons, one of which at the present time he has shown it has been constitutionally valid.

So, the only question for the Commission to decide is what punishment they would have given him on that specification that Judge Zirpoli found constitutionally valid. The Commission gave him 15 days suspension for both violations. Now, the Commission has to make a determination of what suspension they would give him on that violation.

It has all been presented and in the Federal Court and any additional evidence I think at this time would only confuse the issue.

MR. BEIRNE: I would point out that the matter is still under the jurisdiction of Judge Zirpoli and as the Commission knows, a report is due back in the Federal Court 45 days from October 30, and according to my calculations that should be somewhere around the 21st or the—no, it's due this Friday.

COMMISSIONER MILLER: That's the 21st.

MR. BEIRNE: The 14th.

COMMISSIONER MILLER: I beg your pardon.

MR. BEIRNE: I think it would behoove the Commission, due to the fact that this is still pending before Judge Zirpoli that we be allowed to introduce additional testimony relative to what Lt. Kannisto is being punished for.

CAPTAIN EIMIL: That is not what they asked the Commission to do. He asked the Commission, on page 9 of the transcript, be it remands the case to the Commission to reconsider the matter in light of the ruling herein made, that was one of the charges of which Officer Kannisto was found guilty was constitutional and the other one was invalid under the Constitution. The Federal Court did not ask for a new hearing or trial.

COMMISSIONER MILLER: May I read this to you two to refresh your memory. Captain Eimil read it in part. If it means the same to you as it does to me, we can proceed.

"It therefore appears that the court is faced with the situation in which the plaintiff was disciplined for two reasons, only one of which at the present time has been shown to be a constitutionally valid ground. Because the court cannot determine what the Commission would have done solely on the basis of the constitutional ground herein found, which was reading the statement to the watch, it remands the case to the Commission to reconsider the matter in the light of the rulings herein made."

Then it says: "The court will retain jurisdiction on this matter and direct, direct the defendants" who are the Commission "to report the result of the remand herein made within 45 days of the day hereof."

I think it's pretty clear that the matter has been adjudicated and we are to determine, we originally, our decision in the matter said "We find him guilty in both charges and we therefore suspended Lt. Kannisto for 15 days beginning tomorrow which was October 31st, I guess—some other date.

MR. BEIRNE: I made three motions. I will take them one at a time. First, my motion for the rehearing of the entire matter. Can I have a ruling?

PRESIDENT GARNER: That is denied.

MR. BEIRNE: Then I would renew my second motion, that would be that the Commission not redetermine this matter until it has an opportunity to review the transcripts of the proceeding in the Kannisto trial and thereafter make a determination after reading those transcripts.

This matter has been pending before you and in the Federal court for almost a year now and I believe the initial trial in this matter was had in January of this year, 1973. It is now December, and I don't think a proper redetermination of the issues presented to the Commission can be made in light of memory.

PRESIDENT GARNER: Denied.

MR. BEIRNE: And thirdly, my third motion, I would like to renew that also. I would ask that I be permitted to let the defendant, Lt. Kannisto, make a statement to the Commission and in conjunction with that, I would like to ask to put on two witnesses, Officer James Pera who was under the command of Lt. Kannisto at the Mission Station at the time of the incident and the Lieutenant's present commanding officer, Captain J. William Conroy.

PRESIDENT GARNER: That motion, Mr. Beirne, is also denied, and I think we'll proceed from here with the Secretary upholding the Commission for how we voted on the sentence.

SERGEANT FRAZIER: Dr. Garner.

PRESIDENT GARNER: I vote 15 days suspension for reading the article before the watch.

SERGEANT FRAZIER: Commissioner Miller.

COMMISSIONER MILLER: I can't segregate in my mind how much I sentence him for any particular reason. He was charged on two specifications, one which was for having the, a statement published in the magazine or the newspaper The Policeman, San Francisco Policeman; and the other for reading to his watch.

There is no way I can distinguish in my mind because I think the overwhelming consideration in my mind was that the statement that Lt. Kannisto was, read to his Watch and had published in his, the San Francisco Policeman, was augmented by a paragraph which he apparently did not have the courage to read here when he was on the stand and that, to me, was an act which was inexcusable.

So that, I really, to me, the reading to the Watch of its own is sufficient for a 15 day suspension.

SERGEANT FRAZIER: Commissioner Cardoza.

COMMISSIONER CARDOZA: My decision was predicated on the fact that he read, his testimony given before this Commission, to his Watch on December 21st, 1972, and for that act I, in my mind, sentenced him or gave him 15 days suspension.

MR. BEIRNE: Just to refresh your recollection in the matter, it is a faite occompli now, you will recall when he read to his watch, no charges were filed against him and subsequently when he published it in the paper, at that time the charges were filed against him.

I'm sure it was the Department's position at the time they filed the charges against him that the graver of the two alleged offenses which he committed by reading testimony that he had been given, or had given before this Commission, was the fact that he published in the paper for everyone to see, and I submit to the Commission by not mitigating on the basis of finding him guilty of two charges and only one in compliance with the Federal Court's decision, that this constitutes a bending of the rules and pro-

cedures of this Department and I won't say a miscarriage of justice, but it certainly over-looks the fact that he was found guilty of two charges and served 15 days as a result and now found guilty of one, he still has that.

I think that the Memorandum of Understanding has to act in an even-handed manner and I don't feel the way the Commission acted here in sustaining the full 15-day sentence is an even-handed manner.

Thank you, gentlemen.

SERGEANT FRAZIER: That concludes all the items on the calendar.

PRESIDENT GARNER: I move we adjour.

(Whereupon, the hearing in the above-matter was ended.)

s/ Linda S. Pransky, C.S.R.